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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 6

COMPAGNIE GENERALE TRANSATLANTIQUE,
PETITIONER,

vs.

PHILIP ELTING, COLLECTOR OF CUSTOMS,
PORT OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 15, 1935.

CERTIORARI GRANTED APRIL 29, 1935.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L. 50/136

COMPAGNIE GÉNERALE TRANSATLANTIQUE, Plaintiff,

against

PHILIP ELTING, Collector of Customs at the Port of New York, Defendant

STATEMENT UNDER RULE 13, PAR. 4

The action was commenced on June 30, 1931.
Summon and complaint, filed July 8, 1931.
Answer filed February 1, 1932.
Trial was had February 2, 1934, before Hon. Francis G. Caffey and a jury of one.
Judgment entered February 24, 1934.
Appeal taken April 10, 1934.
Bill of Exceptions filed May 3, 1934.
Time to file bill of exceptions and record on appeal duly extended.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

SUMMONS

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable, John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 30th day of June, A. D. 1931.

Charles Weiser, Clerk.

John M. Lyons, Plaintiff's Attorney, Office and Post Office Address, 27 William Street, Borough of Manhattan, City of New York. (Seal.)

[fol. 3] In United States District Court, Southern District of New York

Compagnie Generale Transatlantique, Plaintiff,

against

Philip Elting, Collector of Customs at the Port of New York, Defendant.

Complaint

Plaintiff, a corporation duly organized and existing under and pursuant to the laws of the Republic of France, and having a place of business and transacting business at No. 19 State Street, New York, N. Y., which is within the limits of the District Court of the United States for the Southern District of New York, for its complaint against Philip Elting, Collector of Customs at the Port of New York, alleges and shows as follows:

For a First Cause of Action

1. That during all the times hereinafter mentioned, plaintiff was and still is a corporation duly organized under the laws of the Republic of France and engaged as a common carrier in the transportation of passengers and cargo for hire between European ports and seaports of the United States.

2. That during all the times hereinafter mentioned, the defendant was and still is the Collector of Customs at the Port of New York.

[fol. 4] 3. That the plaintiff was at all times hereinafter mentioned and still is the owner of the S. S. "Ile de France."

4. That heretofore and on or about February 6, 1930, plaintiff brought to the United States at the port of New York on the S. S. "Ile de France" as a seaman, the alien, Marcel Bourret, aged 23, who was requested to be detained on board said steamship, as is hereinafter set forth in greater detail.

5. That the said Marcel Bourret arrived as a seaman and was regularly listed as a member of the crew, being an assistant cook on the S. S. "Ile de France"; that on the vessel's arrival it was boarded by a representative of the United States Immigration Service who directed the master to detain this seaman and 101 other members of the crew of the "Ile de France" on the ground that they had not established that they were bona fide alien seamen. The order for detention was given pursuant to the Act of Feb. 5, 1917, reference to the Act of Dec. 26, 1920, and the Act of May 26, 1924, being stricken out of the notice. This notice, therefore, was given under Section 32 of the Act of 1917, which was repealed by the Act of 1924, and the authorization for the giving of such notice was therefore non-existent. There was no question as to the seaman status of the said alien, but notwithstanding that all due precaution was taken to prevent his escape the alien effected his departure. That subsequently the plaintiff was advised by the Commissioner of Immigration at the Port of New York that the ascertained facts indicated that a fine of $1,000.00 should be imposed. The notice further stated that the plaintiff would [fol. 5] be allowed a certain period of time within which to submit evidence to show that such fine should not be imposed.

6. That plaintiff in accordance with the statute and regulations made thereunder duly filed a protest with the Secretary of Labor and submitted evidence to show why a fine should not be imposed.

7. The evidence submitted and the file and records of the Bureau of Immigration, Department of Labor, in the case of Marcel Bourret establish the following facts:

(a) That the said Marcel Bourret was born in and is a native of France.

(b) That the seaman Marcel Bourret was duly signed on the S. S. "Ile de France" as a member of the crew and

satisfactorily established that his seaman's status was bona fide.

(c) That the said Marcel Bourret was never given a fair hearing or in fact any hearing, or an opportunity to show he was a duly registered seaman entitled to shore leave.

(d) That the immigration law in effect at the time of the aforesaid seaman's arrival, as described in Subd. 5 of Section 3 of the Immigration Act of 1924, provides for the admission of alien seamen serving on a vessel arriving at a port of the United States seeking to enter temporarily into the United States solely in the pursuit of their calling as a seaman.

(e) That no proper notice was given to the plaintiff, the party sought to be charged.

[fol. 6] 8. That thereafter notwithstanding that the alien was coming to the United States solely in pursuit of his calling as a seaman, the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed.

9. That subsequently the Collector of Customs at the Port of New York, the defndant herein, refused to clear the said vessel and permit its departure unless the sum of $1,000.00 which represented the fine, was paid to him. That thereupon, and for the sole purpose of securing clearance and avoiding detention of the vessel and to permit of its departure, the plaintiff under protest deposited the sum of $1,000.00 with the defendant.

10. That the alien was brought to the United States based on the conclusion that he was a seaman and as such had a right to go ashore for a period of sixty days and his seaman status was unquestioned.

11. That in bringing the said alien to the United States on the S. S. "Ile de France" and the fact that this alien seaman left the vessel did not justify the imposition of any fine on the plaintiff, and the act of the Secretary of Labor in imposing a fine was without lawful authority and arbitrary, and the defendant had and received said money to the use of the said plaintiff.

12. That the alleged inadmissibility of the aforesaid alien seaman was not known and could not have been ascertained

by the exercise of reasonable diligence by the plaintiff herein prior to the alien's departure from the foreign port of embarkation.

[fol. 7] 13. That demand has been duly made by the plaintiff and payment has been refused by the defendant.

For a Second Cause of Action

14. Plaintiff realleges paragraphs 1, 2 and 3 with the same force and effect as if the same were herein fully set forth, and further complaining of the defendant alleges as follows:

15. That heretofore and on or about February 6, 1930, plaintiff brought to the United States at the port of New York on the S. S. "Ile de France" as a seaman, the alien, Fernand Rouquette, aged 24, who was requested to be detained on board said steamship, as is hereinafter set forth in greater detail.

16. That the said Fernand Rouquette arrived as a seaman and was regularly listed as a member of the crew, being a steward on the S. S. "Ile de France"; that on the vessel's arrival it was boarded by a representative of the United States Immigration Service who directed the master to detain this seaman and 101 other members of the crew of the "Ile de France" on the ground that they had not established that they were bona fide alien seamen. The order for detention was given pursuant to the Act of Feb. 5, 1917, reference to the Act of Dec. 26, 1920, and the Act of May 26, 1924, being stricken out of the notice. This notice, therefore, was given under Section 32 of the Act of 1917, which was repealed by the Act of 1924, and the authorization for the giving of such notice was therefore nonexistent. There was no question as to the seaman status [fol. 8] of the said alien, but notwithstanding that all due precaution was taken to prevent his escape the alien effected his departure. That subsequently the plaintiff was advised by the Commissioner of Immigration at the Port of New York that the ascertained facts indicated that a fine of $1,000.00 should be imposed. The notice further stated that the plaintiff would be allowed a certain period of time within which to submit evidence to show that such fine should not be imposed.

17. That plaintiff in accordance with the statute and regulations made thereunder duly filed a protest with the Secretary of Labor and submitted evidence to show why a fine should not be imposed.

18. The evidence submitted and the file and records of the Bureau of Immigration, Department of Labor, in the case of Fernand Rouquette establish the following facts:

(a) That the said Fernand Rouquette was born in and is a native of France.

(b) That the seaman Fernand Rouquette was duly signed on the S. S. "Ile de France" as a member of the crew and satisfactorily established that his seaman's status was bona fide.

(c) That the said Fernand Rouquette was never given a fair hearing or in fact any hearing, or an opportunity to show he was a duly registered seaman entitled to shore leave.

(d) That the immigration law in effect at the time of the aforesaid seaman's arrival, as described in Subd. 5 of [fol. 9] Section 3 of the Immigration Act of 1924, provides for the admission of alien seamen serving on a vessel arriving at a port of the United States and seeking to enter temporarily into the United States solely in the pursuit of their calling as a seaman.

(e) That no proper notice was given to the plaintiff, the party sought to be charged.

19. That thereafter notwithstanding that the alien was coming to the United States solely in pursuit of his calling as a seaman, the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed.

20. That subsequently the Collector of Customs at the Port of New York, the defendant herein, refused to clear the said vessel and permit its departure unless the sum of $1,000.00, which represented the fine, was paid to him. That thereupon, and for the sole purpose of securing clearance and avoiding detention of the vessel and to permit of its departure, the plaintiff under protest deposited the sum of $1,000.00 with the defendant.

21. That the alien was brought to the United States based on the conclusion that he was a seaman and as such had a

right to go ashore for a period of sixty days and his seaman status was unquestioned.

22. That in bringing the said alien to the United States on the S. S. "Ile de France" and the fact that this alien seaman left the vessel did not justify the imposition of any [fol. 10] fine on the plaintiff, and the act of the Secretary of Labor in imposing a fine was without lawful authority and arbitrary, and the defendant had and received said money to the use of the said plaintiff.

23. That the alleged inadmissibility of the aforesaid alien seaman was not known and could not have been ascertained by the exercise of reasonable diligence by the plaintiff herein prior to the alien's departure from the foreign port of embarkation.

24. That demand has been duly made by the plaintiff and payment has been refused by the defendant.

Wherefore, plaintiff demands judgment against the defendant in the sum of $2,000.00 with interest from June 3, 1930, together with the costs and disbursements of this action.

John M. Lyons, Joseph P. Nolan, Attorneys for Plaintiff, 27 William Street, 60 Broad Street, Borough of Manhattan, New York City.

[fol. 11] *Duly sworn to by G. H. de Villeneuve. Jurat omitted in printing.*

[fol. 12] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER

The defendant above named by George Z. Medalie, United States Attorney for the Southern District of New York, his attorney, for his answer to the complaint herein, upon information and belief:

As to the First Cause of Action

1. Denies each and every allegation contained in paragraph numbered 4 of the said complaint, except that on or

about February 6, 1930, the plaintiff brought to the United States at the Port of New York on the S. S. Ile de France the alien Marcel Bourret, aged twenty-three, who was requested to be detained on board said steamship.

2. Denies each and every allegation contained in paragraph numbered 5 of the said complaint, except that the said Marcel Bourret was stated to be an assistant cook on the S. S. Ile de France. That on the vessel's arrival it was boarded by a representative of the United States Im-
[fol. 13] migration Service, who directed the master to retain this alien on the ground that he had not established that he was a bona fide alien seaman. That notices was given under the Immigration Act and that the alien effected his departure.

3. Denies each and every allegation contained in paragraph numbered 6 of the said complaint.

4. Denies each and every allegation contained in paragraph numbered 7 of the said complaint.

5. Denies each and every allegation of paragraph numbered 8 of the complaint, except that the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed.

6. Denies each and every allegation contained in paragraphs numbered 10, 11 and 12 of said complaint.

As to the Second Cause of Action

7. Denies each and every allegation contained in paragraph numbered 15 of the said complaint, except that on or about February 6, 1930, plaintiff brought to the United States at the Port of New York on the S. S. Ile de France the alien Fernand Rouquette, aged twenty-four, who was requested to be detained on board said steamship.

8. Denies each and every allegation contained in paragraph numbered 16 of the said complaint, except that the said Fernand Rouquette was ordered detained by a repre-
[fol. 14] sentative of the United States Immigration Service, who boarded the vessel on its arrival and who ordered the said Fernand Rouquette detained on the ground that he had not established that he was a bona fide alien seaman.

9. Denies each and every allegation contained in paragraphs numbered 17 and 18 of the said complaint.

10. Denies each and every allegation contained in paragraph numbered 19 of the said complaint, except that the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed.

11. Denies each and every allegation contained in paragraphs numbered 21, 22 and 23 of the said complaint.

Wherefore, the defendant demands judgment against the plaintiff dismissing the complaint, together with the costs and disbursements of this action.

George Z. Medalie, United States Attorney for the Southern District of New York, Attorney for Defendant, Office and P. O. Address, U. S. Courts and P. O. Bldg., Borough of Manhattan, City of New York.

[fol. 15] *Duly sworn to by Philip Elting. Jurat omitted in printing.*

[fol. 16] In United States District Court, Southern District of New York

L. 50/136

Compagnie Generale Transatlantique, Plaintiff,

against

Philip Elting, Collector of Customs, Port of New York, Defendant

Judgment

The issues in this action having been regularly brought on for trial before the Honorable Francis G. Caffey, United States District Judge, and a Jury of one, at a stated term of this Court held on the 2nd day of February, 1934, and the plaintiff appearing by John M. Lyons, Esq., its attorney (Roger O'Donnell, Esq., of counsel), and the defendant appearing by Martin Conboy, United States Attorney for the Southern District of New York, his attorney (George B.

Schoonmaker, Assistant United States Attorney, of counsel), and the allegations and proofs on behalf of the plaintiff and the defendant having been heard and considered, and thereafter at the close of the testimony for both sides, the attorney for the plaintiff having moved for the direction of a verdict in favor of the plaintiff in each cause of action and the attorney for the defendant having moved for the direction of a verdict in favor of the defendant in each cause of action dismissing the complaint, and the Court having directed a verdict in favor of the defendant in each [fol. 17] cause of action, and the defendant's costs having been taxed in the sum of $30.00,

Now, on motion of Martin Conboy, United States Attorney for the Southern District of New York, attorney for the defendant, it is

Ordered and adjudged that the complaint herein be and the same hereby is dismissed on the merits, and that Philip Elting, Collector of Customs, port of New York, the defendant herein, recover of Compagnie Generale Transatlantique, the plaintiff herein, the sum of $30.00, costs as taxed, and that the defendant have execution therefor.

Judgment signed this 24th day of February, 1934.

Charles Weiser, Clerk.

[fol. 18] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Plaintiff's Bill of Exceptions.

Before Hon. Francis G. Caffey, J., and a jury of one

New York, N. Y. February 2, 1934

APPEARANCES

John M. Lyons, Esq., and Roger O'Donnell, Esq., of counsel, for the Plaintiff.

Martin Conboy, Esq., United States Attorney, by George B. Schoonmaker, Esq., Assistant U. S. Attorney, for the Defendant, of counsel.

STIPULATION AS TO TRIAL

It was stipulated by and between the attorneys for the respective parties hereto that this case should be tried be-

fore the court and a jury of one with the same force and effect as if tried before the court and a jury of twelve, and that each side should move for a directed verdict at the close of the case.

[fol. 19] A jury of one was duly impaneled and sworn.

STATEMENT OF COUNSEL

Mr. O'Donnell: On the arrival of the steamship "Ile de France" February 6, 1930, the vessel was boarded by certain immigration officers, among others, Inspector E. J. Lepoint, and he served upon the fourth officer of the ship, as shown by receipt, which I will offer in evidence later. The fourth officer of the ship, a notice to detain on board the vessel 102 members of the crew. These two men were members of the crew. There is no dispute about that. There was a notice—while these papers purport to be addressed to the owner, agent, consignee, master or officer in charge of the steamship, it was not served upon any of those individuals.

The notice which will be offered in evidence is upon a printed form, reading as follows:

"Pursuant to the provisions of the Acts of February 5, 1917, December 26, 1920, and May 26, 1924, and the immigration regulations issued by the Secretary of Labor thereunder, you are hereby directed to detain on board the steamship Ile de France its crew of men."

The inspector who served the notice struck out all reference to the acts of December 26, 1920, and May 26th, 1924, so that the notice as amended by him read "Pursuant to the provisions of the Acts of February 5, 1917, and immigration regulations issued by the Secretary of Labor thereunder, you are hereby directed to detain," and so forth.

That was the only notice that was given to the steamship company.

The Court: It did not set out any grounds in the notice?

[fol. 20] Mr. O'Donnell: Yes, it said, "have not established they are bona fide seamen; are not on the visa of the crew list."

The Court: "Not established bona fide seamen"?

Mr. O'Donnell: And "not on the visa crew list." The first notice which the French Line received—they are the plaintiffs in this action—was a notice dated February 19, 1930, 13 days after the arrival of the vessel. The notice reads "To the French Line"——

The Court: Wait a minute. That is an additional notice from the one you have been telling me about?

Mr. O'Donnell: Yes, that is the first notice the company received.

The Court: The first notice served on the company itself?

Mr. O'Donnell: On the company itself. Addressed to the French Line, Agent of the vessel "Ile de France," 19 State Street, New York City. It is a notice of intention to impose a $2,000 fine, not a notice to detain on board. These two seamen in the meantime, and in some manner unknown to the company or its representatives, effected their departure from the vessel by desertion.

In response to the notice of intention to impose a fine, the company through myself as their attorney, submitted a defense under date of May 16, 1930, which will be offered in evidence, setting up a number of grounds as to why the penalty should not be imposed. That defense was overruled by the Secretary of Labor on May 17, 1930, and a fine of $2,000 was ordered to be paid to the Collector of Customs, the defendant in this action. The money was paid on June 3, 1930.

[fol. 21] Mr. O'Donnell: I now offer in evidence, if the Court please, Department of Labor File No. 55704/381.

The Court: Received, Exhibit 1.

(Marked Plaintiff's Exhibit No. 1.)

The plaintiff and the defendant then rested.

STATEMENT BY THE COURT

The Court (orally): First, I think the fact that the notice to detain referred to the wrong statute is of no consequence.

It is settled in a variety of types of cases, which seem to me pertinent here, that reference to a particular statute in a document is more or less in the nature of labeling. There is hardly anything which needs more care than an

indictment. Yet an indictment is good although it be alleged therein, or it be marked on its cover, that it is laid under a provision of law different from that which applies or which constitutes legal foundation for the charge.

Here the direction about detention was not ambiguous. It seems to me, therefore, that the inspector's striking from the body of the notice the dates of enactment of several statutes, and leaving in the notice, after this deletion, reference to a statute of a date which has no bearing on the case, is immaterial.

In the second place, it seems to me that there is no defect in the notice by reason of the fact that it was not personally signed by, or was not signed in the name of, the officer in charge at the port; but, on the contrary, was personally signed only by the inspector. The inclusion in the notice that what the inspector there did was "by direction of the immigration officer in charge" was entirely sufficient to render the notice a notice given by the officer in charge. It [fol. 22] thus enabled the inspector to take the action he did when he served the notice. Any narrower interpretation of the statute would render it practically unenforceable.

Third, the notice was addressed to the owner, among others. The suit is by the owner. Was the notice to detain served on the owner? That brings up two inquiries.

At the foot of the notice to detain there is an acknowledgment of service by an acknowledgment of the receipt of the notice. The names of two persons are there signed. The signatures are undecipherable to me and I believe they are undecipherable to counsel. It is plain that the name of the first person who signed the receipt is accompanied by the descriptive words "fourth officer." Apparently the name of the person who signed immediately below the fourth officer is accompanied by the word "Commander"; at least it looks to me like the English word "Commander."

The two inquiries that seem to me to arise out of this state of facts are these: (1) Was the service of the notice to detain, which was handed to either the fourth officer alone, or to the fourth officer and the commander, equivalent to service on the master of the vessel? (2) If so, was service on the master of the notice to detain sufficient service on the owner?

On the record, I think I would not be warranted to upsetting the Secretary's action, on the ground of lack of

sufficient service of the notice to detain, without something in the record to indicate that one or the other of the two persons whose names are signed at the foot of the receipt was not in charge of the ship at the time the inspector visited the ship for the purpose of serving a notice to detain [fol. 23] on someone in charge of it. If so—that is to say, if either of those gentlemen who signed the receipt was at the moment in charge of the ship—I think manifestly, within the meaning of the statute, the service was on the master.

My recollection is that there is authority for the proposition of law I have stated, though I am not sure of it. While in regard to a penal statute there may be some room for controversy, I think the weight of argument is in favor of holding that, when he went aboard the ship, service by the inspector on the fourth officer was the equivalent of compliance with the statutory requirement that the service be on the master and that such service was adequate service on the master. One reason why I say this is true is that, if it were held otherwise, it would render exceedingly difficult, and often impracticable, enforcement of the provision of the statute for service on the master.

For example, if the statute were construed as requiring literally that the master individually be physically served, then that would mean that unless, when the inspector went aboard the ship, he could locate the master and have access to him personally, then the entire purpose of the statute could be frustrated. It would mean that unless, indeed, when the master absented or secluded himself, he left the ship in charge of the owner or the charterer or the agent, the Government would be powerless to enforce the law. I do not believe that the statute should be so narrowly construed or construed so as to lead to such a result.

Suppose the master was away from the ship—or if on the ship, away from his post, off duty, and not to be found [fol. 24] by the utmost diligence—at the time the inspector went aboard. In a situation like that, if the statute were construed to mean that the master individually must be served, it would seem to follow that if the inspector, when he went on the ship for the purpose of serving the notice, ascertained that the master himself was absent from the ship, then he could not even serve the person in charge of the ship, in lieu of and exercising the functions of the

master, while the master was absent. Because the interpretation that there must be service on the master personally would lead to such a consequence, I think such an interpretation should be rejected and that we should adopt a more liberal interpretation, which would construe the statute as meaning that service on the fourth officer or service on the commander, who was in command of the ship at the moment, was entirely sufficient to satisfy the satutory requirement of service on the master and that such service should be treated as the equivalent of service on the master.

I find nothing to the contrary in any of the three cases relied on by the plaintiff.

In the Columbus case, 62 Fed. (2d), the agent was sued; but the agent had not been served with notice to detain. It was, therefore, held—necessarily, as it seems to me—that there could be no recovery.

In the Winchester case, 40 Fed. (2d), there were the same facts. The agent was sued, although not served with the direction to detain—the fact being that the master had been served with the notice to detain. As matter of law, the master is not the representative of the agent of the ship. Moreover, in the Winchester case, at page 473, there is [fol. 25] a direct statement, and in the Columbus case, at page 796, it is not denied and perhaps is implied, that the master is the agent of the owner.

Again, in Navigazione Libera, etc. v. Elting, the so-called Isarco case, 4 Fed. Supp. 951, decided by Judge Goddard, the notice of intention to fine was addressed to the agent only. It was not addressed to the owner. It was not served on the owner. It was served on the agent only. The suit was by the owner; but, the notice of intention to fine not having been addressed to or served on the owner, for that reason it was held that what was done in connection with the notice of intention to fine was insufficient to charge the owner with liability.

There is another reason which tends to sustain the conclusion I have reached; that is, as I construe it, by the protest in the case at bar, as phrased, the complaints made by the owner, when cited to show why fines should not be imposed, were put on somewhat different grounds from those advanced at this trial. I believe that there was no complaint that the owner was not properly served with notice to detain or of intention to impose a fine; but even if so,

failure to give notice of intention to fine was waived because the owner then appeared by counsel.

There has been some discussion as to whether there was a fair hearing—although, as I understand, counsel for plaintiff does not make the point. Only the defendant itself mentioned it. The fact is, however, that there was a fair hearing.

Gentlemen, you may make your motions.

MOTIONS FOR DIRECTED VERDICT

Mr. O'Donnell: Plaintiff moves for a directed verdict in favor of the plaintiff.

Mr. Schoonmaker: Defendant moves for a directed verdict for defendant on the first and second causes of action. [fol. 26]—Mr. O'Donnell: In both causes I move for a directed verdict for the plaintiff.

The Court: There is no occasion to rule on them separately?

Mr. O'Donnell: No. I want it to cover both causes; I want the exception to cover both.

The Court: Motion of the plaintiff denied, with an exception to the plaintiff. Motion of the defendant granted.

Mrs. O'Donnell: Does that exception also go to the opinion expressed in the matter, as well as the decision, because I want to reserve my legal points on them?

The Court: You may take an exception.

Mr. O'Donnell: Special exception to that?

The Court: Yes.

Mr. O'Donnell: I wish to reserve a special exception to the opinion. I would like to have an exception noted as to the reason.

The Court: You have an exception, in so far as any exception is necessary, in order to raise the question. What I have said was just by way of explanation—how I have reasoned in reaching my conclusion; that is all. You may have an exception.

Mr. O'Donnell: In other words, it is a mere explanation of the mental process.

The jury accordingly returned a verdict for the defendant in each cause of action.

[fol. 27] ORDER SETTLING BILL OF EXCEPTIONS

Upon the annexed consent and on motion of John M. Lyons, attorney for the plaintiff herein, I hereby sign, settle and allow the foregoing, together with the exhibits admitted in evidence, as and for the plaintiff's bill of exceptions and order the same to be filed.

Dated, New York, N. Y., May 2, 1934.

Francis G. Caffey, U. S. D. J.

I hereby consent to the settling, allowing and filing of the above, together with the exhibits admitted in evidence, as and for the plaintiff's bill of exceptions.

Dated, New York, N. Y., May 2, 1934.

Martin Conboy, United States Attorney, Attorney for Defendant.

[fol. 28] PLAINTIFF'S EXHIBIT 1

United State Department of Labor, Bureau of Immigration
File 55704/381.

Form 559—Notice to Deliver, Detain on Board, or Remove Aliens

U. S. Department of Labor,

Immigration Service

Port of N. Y., 2/6, 1930.

To the Owner, Agent, Consignee, Master or Officer in Charge of the SS. Ile de France, Frence Line:

Pursuant to the provisions of the Acts of February 5, 1917, and the Immigration Regulations issued by the Secretary of Labor thereunder, you are hereby directed to detain on board S/S Ile de France the following-named aliens, with their baggage, your attention being invited to the appropriate sections of the statute appearing on the reverse side hereof:

Name — Status on vessel (1st, 2d, or 3d class passenger; member of the crew; stowaway, etc.)

Seamen as per attached list, Hundred and Two (102) in all. Have not established that they are bona fide seamen, and not on visa crew list.

By direction of the Immigration Officer in Charge.

E. J. Lapointe, U. S. Immigrant Inspector.

Receipt of the above notice is hereby acknowledged.

4th Officer (Signature illegible.) (Title of person signing receipt). (Signature illegible), Commander.

[fol. 29] (Over.) (Here are printed the Extracts from the Acts of February 5, 1917 December 26, 1920, and May 26, 1924.)

Paquebot "Ile de France"

Personnel Embarque Par L'Armement De Paris

ALLUITE	Lucien	Chef de partie
DEBEUIL	Rémond	"
MARCHAND	Francis	"
COURBOIN	Henri	"
BENITES	Francois	"
DOUCET	Raymond	"
SURDON	Pierre	"
GIPONNI	André	"
ROY	Paul	"
MAUBLANC	Francois	"
HIXON	Albert	"
DURAND	Paul	"
SALLIER	Louis	"
DOUTHE	Paul	"
PLAUCHE	Claude	Cuisiner
POTE	Georges	"
DERILLETTE	Alexis	"
KIELY	Armand	"
FANCELLI	Antoine	"
PETIT	Roger	"
CHOUCHEROLLE	Henri	"
REGAMEY	Leon	"

Paquebot "Ile de France"—Continued

CHANTRY	Edmond	Cuisiner
CASAGRANDE	Edouard	"
LAMADON	Julien	"
COTHAN	Policarpe	Aide "
ASSUIED	Félix	" "
PAROY	Jean	" "
BOURETTE	Marcel	" "
DESPLATS	Gustave	" "
PASCAL	Georges	" "
LE ROUX	Albert	" "
PASTIER	Abel	" "
RICOUX	Emile	" "
GUILLUY	André	Boucher
URIEN	Alphonse	"
HACK	Henri	Patissier
CRAMFORT	Marcel	"
LECHERC	Louis	"
LEMERRE		"
GRANGER		"
SURVILLE	Georges	Boulanger
CHATELIER	Joseph	Garcon
THIEBAUT	James	"
DURAND	Felix	"
ROUQUETTE	Fernand	"

[fol. 30]

MAUCURIER	Marcel	"
CHARTIER	Maurice	"
POSTE	André	"
GRENIER	Jean	"
DEMANNEVILLE	Georges	"
DUPONT	Jules	"
DUPEYRAT	André	"
SADET	Léon	"
ROVELLO	Arthur	"
BONY	Francois	"
CARBONNIER	Lucien	"
BERGEON	Georges	"
BIRAUX	André	"
MEYER	René	"
DUPAS	Henri	"
POLIVKA	Marcel	"
LACOUSTILLE	Justin	"

Paquebot "Ile de France"—Continued

SAUNIER	André	Garcon
GAY	Georges	"
GRANCHER	Emile	"
BROSSARD	Jean	"
LEDREAUX	Alain	"
BERTRON	Marcel	"
CORMIC	Jean	"
BEAUDRON	Robert	"
MONTANIER	Robert	"
BLANCHERD	Robert	"
VIRGILLE	Joseph	"
BERTIN	André	"
GUYOT	Pierre	"
LATAPI	René	"
CONVERSY	Georges	"
LAVEAU	Lucien	"
CANCEL	Louis	"
CAILLAT	Fernand	"
GUILLAMOT	Jean	"
MORINEAU	Alphonse	"
BRAUN	Maurice	"
MONNIN	Alexandre	"
VOURET	Marice	"
LACAZE	Henri	"
ROUGIER	Pierre	"
DUBOIS	Francois	"
MAYSONNAVE	Eugène	"
BARD	Gustave	"
LAVABRE	Célestin	"
CURE	René	"
THOMAS	Francois	"
GUIDON	Paul	"
LE ROUX	Henri	"
FABRE	Francois	"
HERMAND	Arsène	"
CORRE	Pierre	"
EHERET	Jules	"
DOUBLET	Fernand	"
NADERAS	Fernand	"

[fol. 31] U. S. Department of Labor

Immigration Service

Office of Commissioner of Immigration,
Ellis Island, New York Harbor

In answering refer to No. —.

Feb. 7, 1930.

Commissioner of Immigration:

Inspector Lapointe, who examined the crew of SS "Ile de France" upon its arrival yesterday, directed the detention on board of 102 members of the crew because they did not establish that they were bona fide seamen. He reports that the following named were not on board the vessel when it sailed to-day:

Marcel Bourret, age 23, French, asst. cook;
Fernand Rouquette, age 24, French steward.

A copy of the detention order is attached hereto.

J. J. McKee, Inspector-in-charge, Boarding Division.

(Stamped: Rec'd U. S. Immigration Service, Ellis Island, Feb. 7, 1930, 3:43 P. M.)

[fol. 32] (Duplicate)

Notice of Liability for Fine on Account of Failure to Detain on Board, etc., Alien Seamen

U. S. Department of Labor,

Immigration Service

99171/602.

Office of Commissioner of Immigration,

Ellis Island, New York Harbor

February 19, 1930.

To French Line, Agent (Master or commanding officer) of the Vessel "Ile de France" at N. Y. 2/6/30. 19 State Street, N. Y. C.:

You are hereby notified that it appears that the alien seamen whose names are shown herein were permitted to land

in the United States contrary to regulations prescribed by the Secretary of Labor, or were not detained on board until inspected by the Immigration officers, or were not detained on board after such inspection or deported as required by such immigration officers, or the Secretary of Labor. It therefore appears that a fine should be imposed, under the provisions of Sections 19 and 20 of the "Immigration Act of 1924."

If you desire a hearing as to whether a fine should be imposed in this instance, you will be allowed sixty days from the date of this notice for that purpose, and the vessel on which the said alien arrived will be granted clearance papers when she is ready to sail and allowed to proceed upon her outward-bound voyage upon condition that you [fol. 33] deposit with the Collector of Customs at this port, prior to her sailing, the sum indicated below as security for the payment of the said fine, should it be imposed. Please submit evidence in duplicate.

Name of alien	Amount required to be deposited	Details of violation
Marcel Bourret, 23, Asst. Cook.	$1000	Failure to detain on board after service of notice to do so.
Fernand Rouquette, 24, Steward.	1000	

(S) (Name) Byron H. Uhl, (Official Title) Assistant Commissioner.

cc.

Received the above notice 2/28/30.

French Line, per (Illegible).

Witness: Jos. J. Juiliani.

[fol. 34] Law Office of Roger O'Donnell,
Westory Building, Washington, D. C.

FL. #811.

March 1, 1930.

The Honorable The Secretary of Labor, Washington, D. C.

SIR:

Entry of Appearance is hereby made in the case of the person named below, which is to come before the Department of Labor on fine proceedings.

Name-: Marcel Bourret and Fernand Rouquette.
Port: New York, N. Y.

I will appear as attorney for the French Line in the above proceedings.

Upon receipt of the record, advices are requested by the undersigned.

Respectfully, Roger O'Donnell.

ROD: mkb.

Appearance of Attorney Roger O'Donnell.

[fol. 35] French Line,

Compagnie Generale Transatlantique,

19 State Street, New York

FL. #811.

March 6, 1930.

U. S. Commissioner of Immigration, Ellis Island, N. Y. H.

SIR:

In reference to your file No. 99171/602, fine notice concerning the failure to detain Marcel Bourret and Fernand Rouquette on board SS "Ile de France" after service of notice to do so, we request that the papers in this matter be forwarded to the Department in Washington with notice that our attorney, Mr. Roger O'Donnell, will appear and present suitable defense.

Respectfully, Compagnie Generale Transatlantique, by John J. Scotto, Asst. General Passenger Manager.

wn.

(Stamped: Rec'd U. S. Immigration Service, Ellis Island, Mar. 10, 1930, 10:14 A. M.)

[fol. 36] U. S. Department of Labor,

Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

In answering refer to No. 99171/602.

March 15, 1930.

Commissioner General of Immigration, Washington, D. C.:

There is transmitted herewith notice of liability for fine served on the French Line, agents of the SS "Ile de

France" at New York February 6, 1930, incident to a violation of sections 19 and 20 of the Act of 1924 on account of the failure of the Master of the vessel to detain on board ship Marcel Bourret and Fernand Rouquette, members of the crew, after service of an order to do so.

Report of Inspector in Charge of the Boarding Division, dated February 7, 1930, and copy of Form 559 served upon the Master are herewith enclosed. No formal protest has been submitted by the Line as they indicate that Mr. Roger O'Donnell will appear before the Department and present suitable defense.

On the facts before me, there has been a clear violation of law. I therefore recommend the imposition of fine.

Byron H. Uhl, Assistant Commissioner.

JS:AK.
Encl.

(Stamped: Rec'd Bu. of Immigration, Mail and Files, Mar. 17, 1930, 1:45 P. M.)

[fol. 37] Mar. 18-30.

55704/381.

Marcel Bourret & Fernand Rouquette, SS Ile de France, Feb. 6-30.

To Atty. O'Donnell this date.

J. W. B.

Law Office of Roger O'Donnell,
Westory Building, Washington, D. C.
Telephone Dist. 1153. Cable Address: O'Donnell,
Washington

Roger O'Donnell. William J. Peters, Lambert O'Donnell, Thomas W. O'Brien.

May 16, 1930.

Commissioner-General of Immigration, Department of Labor, Washington, D. C.:

File No. 55704/381

SIR:

This relates to fine notice under the above number, directed to the French Line and covering the cases of Marcel

Bourrett and Fernand Rouquette, members of the crew of the SS "Ile De France" which arrived at New York, [fol. 38] February 6, 1930, the ground for the fine notice purporting to be Section 20 of the Act of February 26, 1924, for alleged failure to detain on board said vessel the two alien sailors mentioned, who were reported on Form 689 as deserters.

The order for detention of these aliens was issued by E. J. Lapointe, United States Immigration Inspector, and was given pursuant to the provisions of the Act of February 5, 1917, reference to the Act of December 26, 1920, and Act of May 26, 1924, being stricken out of the notice. It is obvious, therefore, that this notice was given under Section 32 of the Act of 1917, which was repealed by the Act of 1924, and the authorization for the giving of any such notice was therefore non-existent.

Furthermore, Section 20 of the Act of 1924 is highly technical as it requires inspection of the Immigration Officer in Charge at the port of arrival, in this instance the Commissioner of Immigration for the port of New York; and, even if the notice had been issued under Section 20 of the Act of 1924, such notice was worthless unless issued by the Immigration Officer in Charge. There is no authority in Section 20 to delegate the power which reposes in the Immigration Officer in Charge to any subordinate officer, which is in direct contrast to the provisions of Section 15 of the Act of 1917, relating to the inspection of alien passengers, which expressly authorizes the sending of competent assistants to vessels for the inspection of arriving alien passengers. The statutory authority conferred by Section 20 of the Act of 1924 is confined to the Immigration Officer in charge at the port of arrival and no such notice was issued in this case. This statute is so highly penal in its [fol. 39] provisions that it must be strictly construed in favor of the accused.

There is no evidence to show any inspection officer or employee of the French Line had anything to do with the escape of these two sailors from the vessel and in the absence of the notice which the statute prescribes, it is submitted that no penalty was incurred and that the Department's finding should be in accordance with that conclusion.

In behalf of the French Line, formal protest is hereby made against any action looking to the imposition of the penalty and all legal rights are expressly reserved.

Respectfully, Roger O'Donnell, Attorney for the French Line.

ROD:mkb.

55704/381—Ellis Island.

May 17, 1930.

In re: SS "Ile de France," February 6, 1930.
Aliens: Marcel Bourret and Fernand Rouquette.
This case comes before the Board of Review in fine proceedings.
No hearing. Attorney Roger O'Donnell interested.
Report to the Comptroller General.

The record relates to the failure of the master to detain on board the two aliens named above after due notice to do so had been served on him. They arrived as members of the crew.

[fol. 40] The attorney protests against the imposition of a fine on the ground that the detention notice served on the master was pursuant to the provision of the Act of February 5, 1917, as reference to the Act of December 26, 1920, and the Act of May 26, 1924, had been stricken out. He contends that as Section 32 of the Act of 1917 was repealed by the Act of 1924, there was no authority in law for serving the notice and that in any event, the Commissioner of Immigration at the port of New York must serve such notices as he cannot delegate this authority to any subordinate officer. He contends that there is no evidence to show that any officer or employee of the French Line had anything to do with the escape of these two seamen from the vessel and that no penalty was incurred and the fine should be remitted.

Section 32 of the Act of 1917 was not repealed by the Act of 1924. The latter act provides that where a legal notice is served on the master to detain on board and deport a member of the crew and where such notice is not complied with a penalty is to be imposed. Whether or not the Inspector or some other person crossed out from the notice reference to the Act of 1924, the notice nevertheless remains legal and binding. While there is nothing to show negli-

gence on the part of the master or any other employee in connection with the landing of these two aliens, there was a failure to detain them on board and deport them and this failure is proved by the fact that they were not on board the vessel at the time it left the United States and by the admission of the Steamship Company.

It is found that there was a violation of law in this instance, and it is recommended that the penalty as provided [fol. 41] in Section 20 of the Act of May 26, 1924, be imposed in the sum of $2,000.

JWB.FVS.

So ordered.

L. Paul Winings, Chairman, Secy. & Comr., Genls. Board of Review. W. N. Smelser, Assistant to the Secretary.

Received May 19, 1930 at 12:15 P. M.

U. S. Department of Labor, Bureau of Immigration, Washington

No. 55704/381—C.

May 21, 1930.

The Comptroller General of the United States, Washington, D. C.:

Dear Sir:

The bureau desires to inform you that a fine in the amount of $2,000 has been finally imposed against the S. S. "Ile de France" arriving at New York on February 6, 1930, on account of the aliens Marcel Bourret and Fernand Rouquette.

The appropriate immigration officer has been directed to request the appropriate customs officer to deposit the [fol. 42] amount as above indicated in the Treasury and return the passage money in the sum of $—— to the alien (his parents, or guardian, etc.). New York file No. 99171/602.

Respectfully, Harry E. Hull, Commissioner General.

1247—ed.

55704/381—C.

May 21, 1930.

Roger O'Donnell, Esquire, Westory Building, Washington, D. C.

DEAR SIR:

In reply to your letter of May 16, 1930, you are informed that the Department has found it necessary to impose a fine against the French Line, agents of the S. S. "Ile de France," on account of the aliens Marcel Bourret and Fernand Rouquette, in the sum of $2,000.00, as provided in Section 20 of the Act of May 26, 1924.

Respectfully, Harry E. Hull, Commissioner General.

Official copy hereof furnished the Commissioner of Immigration, Ellis Island, New York Harbor, for his information and appropriate action, reference being had to his file No. 99171/602.

George J. Harris, Assistant Commissioner General.

[fol. 43] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the plaintiff by its attorney, John M. Lyons, and says that in the record and proceedings in the above-entitled cause there is manifest error which occurred at the trial of the proceedings had in the said cause upon which it will rely in the proescution of its appeal therein in the following:

First. The Court erred in directing a verdict for the defendant in causes of action numbered "1" and "2."

Second. The Court erred in granting defendant's motion for a directed verdict in causes of action numbered "1" and "2."

Third. The Court erred in not holding that the Secretary of Labor was arbitrary in imposing fines on the plaintiff under Section 20 of the Immigration Act of 1924 and Section 32 of the Immigration Act of 1917.

[fol. 44] Fourth. The Court erred in not holding that by the provisions of Section 20 of the Immigration Act of 1924 it is required that the inspection of alien seamen be made by the Immigration Officer-in-Charge at the port of arrival —in this instance the Commissioner of Immigration at the Port of New York.

Fifth. The Court erred in not holding that the fine notice was worthless unless issued by the Immigration Officer-in-Charge at the port of arrival.

Sixth. The Court erred in not holding that the owner, charterer, agent, consignee or master, to become liable to a fine under Section 20 of the Immigration Act of 1924 for the escape of alien seamen, must be individually ordered to detain the seamen on board.

Seventh. The Court erred in not holding that in order to lay the basis for the imposition of a fine under Section 20 of the Immigration Act of 1924 against the owner of the vessel for the escape of alien seamen, the notice to detain the seamen and the notice of intention to fine must both be served on the owner, plaintiff herein.

Eighth. The Court erred in holding that there was sufficient evidence in the records before the Secretary of Labor in Causes of Action 1 and 2 upon which to predicate fines for the escape of these alien seamen.

Ninth. The Court erred in holding that notice to the master of the vessel is sufficient notice to the owner.

[fol. 45] Wherefore, the plaintiff prays that the judgment herein in favor of the defendant be reversed and held for naught and that the paintiff be restored to all things which it has lost by reason of said judgment.

Dated New York, N. Y., April 5, 1934.

John M. Lyons, Attorney for Plaintiff. Office and P. O. address: 27 William Street, Borough of Manhattan, New York City.

In United States District Court, Southern District of New York

[Title omitted]

Petition for and Allowance of Appeal

Now comes the plaintiff, Compagnie Generale Transatlantique, and says that on the 24th day of February, 1934, the Court entered judgment herein against it dismissing [fol. 46] the complaint on its merits, and that by such judgment certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear from the assignment of errors filed with this petition.

Wherefore, the plaintiff prays for an appeal from the said judgment to the United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of and for the allowance of the appeal and for leave to prosecute the same, and that a transcript of the record and proceedings in this cause, duly authenticated, be forwarded to the said Circuit Court of Appeals.

Dated New York, N. Y., April 5, 1934.

John M. Lyons, Attorney for Plaintiff. Office and P. O. address: 27 William Street, Borough of Manhattan, New York City.

The foregoing appeal is hereby allowed.

Dated New York, N. Y., April 5, 1934.

Wm. Bondy, U. S. D. J.

[fol. 47] Citation, in usual form, omitted in printing.

[fol. 48] In United States District Court, Southern District of New York

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled action, as agreed upon by the parties.

Dated New York, May 11, 1934.

John M. Lyons, Attorney for Plaintiff-Appellant. ——
——, United States Attorney, Attorney for Defendant-Appellee.

[fol. 49] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 50] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

COMPAGNIE GENERALE TRANSATLANTIQUE, Appellant,

against

PHILIP ELTING, Collector of Customs at the Port of New York, Appellee

HAMBURG-AMERICAN LINE, Appellant,

against

PHILIP ELTING, Collector of Customs at the Port of New York, Appellee

Before Manton, L. Hand and Swan, Circuit Judges

Appeals from the District Court for the Southern District of New York. Suits to recover penalties imposed for violation of the Immigration Act of 1924 (§ 20) (8 U. S. C. 167). Judgments for defendants; plaintiffs appeal. Affirmed.

Roger O'Donnell, Esq., John M. Lyons, Esq., Attorneys for Appellants.

Martin Conboy, Esq., United States Attorney, Attorney for Appellee. George B. Schoonmaker, Esq., Asst. U. S. Attorney, of Counsel.

MANTON, Circuit Judge:

[fol. 51] These cases involve similar questions and will be considered in one opinion. In Compagnie Generale Transatlantique, the S.S. "Ile de France" arrived at the port of New York February 6, 1930, having on board alien seamen. The immigration inspector boarded the vessel, examined the crew, and directed the detention of 102 members because they did not establish to his satisfaction that they were bona fide seamen. An order of detention was served upon the Fourth Officer of the vessel and also a person designated as Commander. Thereafter two of the seamen ordered detained escaped.

In the Hamburg-American Line case, the S.S. "Milwaukee" arrived at the port of New York April 15, 1930, with one alien seaman who did not establish to the satisfaction

of the immigration inspector, who boarded the vessel upon arrival, that he had no intention of abandoning his calling. A notice of detention was served on the First Officer of the vessel directing the detention of this seaman. Later he escaped.

Notice of hearing in the first case was given to the appellant, the owner of the vessel, designated as the "French Line, Agent of the Vessel 'Ile de France' ". Appellant, by counsel, appeared before the Department of Labor and protested against the fine. In the Hamburg-American Line case, the notice was served upon this appellant, owner of the vessel, designated in the notice as the "Hamburg-American Line, Agents for the Vessel 'Milwaukee' ". It appeared before the Department of Labor and its attorney protested against the imposition of the fine, alleging that the order of detention served on the First Officer was in-[fol. 52] valid, asserting that there could be no constructive notice of the order to detain and that the First Officer of the ship was not the agent of the owners. After the imposition of the fines, they were paid to obtain clearance of the vessels.

The officer served on each vessel was in charge of that vessel at the time of the service of the order of detention. In the Hamburg-American Line case, it was the inspector's duty to serve the order on the officer who had the responsibility and control of the crew for the detention of any one of them on board. Ordinarily this is the Master. When the Master is not in charge of the vessel, presumably it is the First Officer who takes the Master's place. United States v. Chemical Foundation, 272 U. S. 1. In the Hamburg-American Line case, in any event, the Master's report shows that he had notice of the order long before the alien escaped, and that he acted upon it. He was required to obey the order of detention and failed to do so.

In the Compagnie Generale Transatlantique case, the notice was sufficient as served. The owner was charged with the Master's or Commander's delinquency. It had notice that the fine would be collected from it and was represented by the attorney who unsuccessfully protested. For the reasons stated in the British Empire Steam Navigation Co. case and the Societe Ligure di Armamento case, decided this day, there were no errors below.

Judgments affirmed.

[fol. 53] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Compagnie Generale Trans., Hamburg American Line v. Philip Elting, etc. (Copy) Opinion. Manton, Circuit Judge.

[fol. 54] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 17th day of December, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

COMPAGNIE GENERALE TRANSATLANTIQUE, Plaintiff-Appellant,

vs.

PHILIP ELTING, as Collector, etc., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 55] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Compagnie Generale Transatlantique vs. Philip Elting, as Collector, etc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 17, 1934. William Parkin, Clerk.

[fol. 56] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 54, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Compagnie Generale Transatlantique, Plaintiff-Appellant, against Philip Elting, as Collector, etc., Defendant-Appellee, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 5th day of January, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 57] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 29, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 7

HAMBURG-AMERICAN LINE, PETITIONER,

vs.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 15, 1935.

CERTIORARI GRANTED APRIL 29, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 7

HAMBURG-AMERICAN LINE, PETITIONER,

vs.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 12, 1935.

—6470-C

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

L. 52/390

HAMBURG-AMERICAN LINE, Plaintiff,

against

PHILIP ELTING, Collector of Customs, Port of New York, Defendant

STATEMENT UNDER RULE XIII, PARAGRAPH 4

This action was commenced by the issuance of a summons on July 28, 1932. The summons and complaint were filed on July 29, 1932. The answer was received on September 26, 1932.

Trial was had February 2, 1934 before Hon. Francis G. Caffey and a jury of one.

Judgment was entered February 24, 1934.

Appeal taken May 9, 1934.

Bill of exceptions filed May 24, 1934.

Time to file bill of exceptions and record on appeal extended.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

SUMMONS

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 28th day of July, A. D. 1932.

Charles Weiser, Clerk.

John M. Lyons and Roger O'Donnell, Plaintiff's Attorney, Office & Post Office Address, 27 William Street, Borough of Manhattan, City of New York. (Seal.)

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

COMPLAINT

Plaintiff, a corporation duly organized and existing under and pursuant to the laws of the Republic of Germany and having a place of business and transacting business at No. 39 Broadway, New York, N. Y., which is within the limits of the District Court of the United States for the Southern District of New York; for its complaint against Philip Elting, Collector of Customs, Port of New York, respectfully alleges and shows as follows:

1. That during all the times hereinafter mentioned plaintiff was and still is a corporation duly organized under the laws of the Republic of Germany and engaged as a common carrier in the transportation of passengers and cargo for hire between European ports and seaports of the United States.

2. That during all the times hereinafter mentioned defendant was and still is the Collector of Customs at the Port of New York.

3. That the plaintiff was at all times hereinafter mentioned and still is the owner of the S. S. "Milwaukee."

[fol. 4] 4. That heretofore, and on or about April 15th, 1930, plaintiff brought to the United States at the Port of New York on the S. S. "Milwaukee" as a bona fide seaman in pursuit of his calling the alien Abraham Silber, aged 23.

5. That upon arrival of the said S. S. "Milwaukee" at the Port of New York the Chief Officer of the said vessel

was given notice in writing by a representative of the Immigration Officer in Charge at the Port of New York to detain the said Abraham Silber on board the vessel; that the said notification was defective and not in accordance with Section 167 of the United States Code. That in pursuance of said notice the Master of the said S. S. "Milwaukee" did detain the seaman, Abraham Silber, on board the said vessel but in some unknown manner the said seaman subsequently left the vessel.

6. That the immigration law in effect at the time of the aforesaid seamen's arrival, as described in subd. 5 of Section 3 of the Immigration Act of 1924, provides for the admission of alien seamen serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily into the United States solely in pursuit of his calling as a seaman.

7. That no notice was given to the plaintiff, the party sought to be charged.

8. That thereafter, notwithstanding that the alien was coming to the United States solely in pursuit of his calling [fol. 5] as a seaman, the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed.

9. That subsequently the defendant refused to clear the said vessel and permit its departure unless the sum of $1,000.00, which represented the fine, was paid to him. That thereupon, and for the sole purpose of securing clearance and avoiding detention of the vessel and to permit of its departure, the plaintiff under protest deposited the sum of $1,000.00 with the defendant.

10. That the alien was brought to the United States because he was a seaman and as such had a right to go ashore for a period of sixty days.

11. That in bringing the said alien to the United States on the S. S. "Milwaukee" and the fact that this alien seaman left the vessel did not justify the imposition of any fine on the plaintiff, and the act of the Secretary of Labor in imposing a fine was without lawful authority and arbitrary and the defendant had and received said money to the use of the said plaintiff.

12. That the alleged inadmissibility of the aforesaid alien seaman was not known and could not have been ascertained by the exercise of reasonable diligence by the plaintiff herein prior to the alien's departure from the foreign port of embarkation.

13. That demand has been duly made by the plaintiff and payment has been refused by the defendant.

Wherefore, plaintiff demands judgment against the defendant in the sum of $1,000.00 with interest thereon from [fol. 6] March 23, 1931, together with the costs and disbursements of this action.

John M. Lyons, Roger O'Donnell, Attorneys for Plaintiff, Office & P. O. Address, 27 William Street, 60 Broad Street, Borough of Manhattan, New York City.

Duly sworn to by John Pannes. Jurat omitted in printing.

[fol. 7] In United States District Court, Southern District of New York

[Title omitted]

Answer

The above named defendant, by George Z. Medalie, United States Attorney for the Southern District of New York, his attorney, for his answer to the complaint herein:

1. Admits that on or about April 15, 1930, the plaintiff brought to the Port of New York on the S. S. Milwaukee an alien, Abraham Silber, and except as thus expressly admitted, denies on information and belief each and every allegation contained in paragraph numbered "4" of the complaint.

2. Admits that upon arrival of the said S. S. Milwaukee at the Port of New York the chief officer of the said vessel was given notice in writing by a representative of the immigration office in charge of the Port of New York to detain the said Abraham Silber on board the said vessel and that after the giving of the said notice the said alien Abraham

Silber left the vessel, and except as thus expressly admitted, denies on information and belief each and every allegation contained in paragraph numbered "5" of the complaint.

[fol. 8] 3. Denies on information and belief each and every allegation contained in paragraph numbered "7" of the complaint.

4. Admits that the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed, and except as thus expressly admitted denies on information and belief each and every allegation contained in paragraph numbered "8" of the complaint.

5. Denies that he has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered "10" of the complaint.

6. Denies on information and belief each and every allegation contained in paragraphs numbered "11" and "12" of the complaint.

Wherefore, the defendant demands judgment against the plaintiff dismissing the complaint, together with the costs and disbursements of this action.

George Z. Medalie, United States Attorney, Southern District of New York, Attorney for Defendant, Office & P. O. Address, U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

[fol. 9] *Duly sworn to by Philip Elting. Jurat omitted in printing.*

In United States District Court, Southern District of New York

L. 52/390

Hamburg-American Line, Plaintiff,

vs.

Philip Elting, Collector of Customs, Port of New York, Defendant

Judgment

The issues in this action having been regularly brought on for trial before the Honorable Francis G. Caffey, United

[fol. 10] States District Judge, and a jury of one, at a stated term of this Court held on the 2nd day of February, 1934, and the plaintiff appearing by John M. Lyons, Esq., its attorney, (Roger O'Donnell, Esq., of counsel) and the defendant appearing by Martin Conboy, United States Attorney for the Southern District of New York, his attorney, (George B. Schoonmaker, Assistant United States Attorney, of counsel) and the allegations and proofs on behalf of the plaintiff and the defendant having been heard and considered and thereafter at the close of the testimony for both sides, the attorney for the plaintiff having moved for the direction of a verdict in favor of the plaintiff and the attorney for the defendant having moved for the direction of a verdict in favor of the defendant, dismissing the complaint, and the Court having directed a verdict in favor of the defendant and the defendant's costs having been taxed in the sum of $30.00.

Now, on motion of Martin Conboy, United States Attorney for the Southern District of New York, attorney for the defendant, it is

Ordered and adjudged that the complaint herein be and the same hereby is dismissed on the merits, and that Philip Elting, Collector of Customs, Port of New York, the defendant herein, recover of Hamburg-American Line, the plaintiff herein, the sum of $30.00, costs as taxed, and that the defendant have execution therefor.

Judgment signed this 24th day of February, 1934.

Charles Weiser, Clerk.

[fol. 11] In United States District Court, Southern District of New York

[Title omitted]

Plaintiff's Bill of Exceptions

Before Hon. Francis G. Caffey, J., and a jury of one

New York, N. Y., February 2, 1934.

Appearances:

John M. Lyons, Esq., and Roger O'Donnell, Esq., of counsel, for the Plaintiff.

Martin Conboy, Esq., United States Attorney, by George B. Schoonmaker, Esq., Assistant U. S. Attorney, for the defendant.

STIPULATION AS TO TRIAL

It was stipulated by and between the attorneys for the respective parties hereto that this case should be tried before the Court and a jury of one with the same force and effect as if tried before the Court and a jury of twelve, and that each side should move for a directed verdict at the close of the case.

A jury of one was duly impaneled and sworn.

[fol. 12] The plaintiff placed in evidence Department of Labor, Bureau of Immigration, File No. 55733/53, as Exhibit 1.

The plaintiff and the defendant then rested.

MOTIONS FOR DIRECTED VERDICT

Thereupon the plaintiff moved for a directed verdict in favor of the plaintiff and the defendant moved for a directed verdict in favor of the defendant.

The Court (orally: "I think that, apart from the additional point made by the defendant that this case grew out of the records showing the testimony of the master, this case comes within the French Line case L 50-136, which I have already disposed of this morning.

The jury accordingly returned a verdict in favor of the defendant as directed.

The plaintiff excepted to the direction of the verdict in favor of the defendant and to the denial of the plaintiff's motion. Exception granted.

ORDER SETTLING BILL OF EXCEPTIONS

Upon the annexed consent and on motion of John M. Lyons, attorney for the plaintiff herein, I hereby sign, settle and allow the foregoing, together with the Exhibit admitted in evidence, as and for the plaintiff's bill of exceptions, and order the same to be filed.

Dated, New York, N. Y., May 24th, 1934.

Francis G. Caffey, U. S. D. J.

[fol. 13] I hereby consent to the settling, allowing and filing of the above, together with the Exhibit admitted in evidence, as and for the plaintiff's bill of exceptions.

Dated, New York, N. Y., May 23rd, 1934.

Martin Conboy, United States Attorney, Attorney for Defendant.

PLAINTIFF'S EXHIBIT 1

Department of Labor,

Bureau of Immigration

File No. 55733/53.

U. S. Department of Labor

Immigration Service

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

In answering refer to No. 99179/394.

August 19, 1930.

Commissioner General of Immigration, Washington D. C.

There is enclosed herewith notice of liability for fine served on the Hamburg-American Line of 39 Broadway, New York City, incident to a violation of section 18 of the [fol. 14] Act of February 5, 1917 for failure to detain on board and deport the alien passenger Eljasz Bank who arrived at this port on the SS "Milwaukee" April 15, 1930. There is also enclosed notice of liability for fine served at the same time incident to a violation of sections 19 and 20 of the Act of May 26, 1924 for failure to detain on board, after service of order to do so, the alien seaman Abraham Silber.

Copies of Forms 559, report of Inspector J. J. McKee dated April 15, 1930, copy of translation of report of the Master of the steamship in question, report of Inspector J. J. McKee dated April 21, 1930, and letter from the Hamburg-American Line dated August 12, 1930, are attached hereto for the Department's consideration.

Instructions are awaited as to imposition of fine.

Byron H. Uhl, Assistant Commissioner.

AK:
Encl.

U. S. Department of Labor,

Immigration Service

In Answering Refer to No. ——.

Office of Commissioner of Immigration, Ellis Island,
New York Harbor, N. Y.

April 21, 1930.

Commissioner of Immigration.

The "Milwaukee," of the Hamburg-American Line, arrived here on the 15th inst. from Hamburg, via Halifax, [fol. 15] at which latter port aliens Julius Keller and Eljasz Bank, ordered deported by the Canadian Government, were placed aboard the ship. Inspector Walter Montgomery served an order on the First Officer of the vessel, directing that these aliens be detained on board. Copy of the detention order was sent to the Executive Office on the 15th inst. with my letter on this subject.

Abraham Silber, Polish, age 23, a galleyman in the crew, did not establish that he had no intention of abandoning his calling, and Inspector Ostrom served an order on the First Officer directing that Silber be detained on board the ship. Copy of this order is hereto attached.

Inspector Maypother, who was present when the "Milwaukee" left this port, 3:00 P. M. 19th inst., reports that Abraham Silber and Eljasz Bank were not on board. A statement by the Master of the ship is attached hereto. It is written in German, and probably contains an explanation of the escape of these men.

J. J. McKee, Inspector-in-Charge, Boarding Division.

[fol. 16] Copy

Translation #6000.

New York, April 19, 1930

SS. Milwaukee.
Trip 9.

Report on the escape of prisoners from ship.

When the SS "St. Louis" arrived at New York, the immigration officers forbade to go off board the passenger of the tourists' class: Elias Bank who was deported from Halifax,—and the ritual cook: Abraham Silber.

Upon the order of the Hamburg American Line, these two men were to be kept aboard and a watchman of the H. A. L. pier police was detailed to hold them in custody.

The two men were locked up in the Isolation Hospital, a watchman of the H. A. L. was posted in front of the door, and the keys given in his hands. The ritual cook was given charge of preparing the meals. The watchmen on duty were controlled from time to time by the officers in charge.

Beginning Friday afternoon 4 o'clock until 12 o'clock the following watchmen were on duty:

Watchman Wahlsch.
Roundsman Donn.

Between midnight and 8 o'clock in the morning:

Watchman Newelle.
Roundsman Wollenreiter.

Second mate Mr. Oertel, making the rounds at 5:30 p. m. found the watchman at his post and the prisoners locked up.

[fol. 17] Shortly after 8 p. m. and at 10 p. m. the IV mate Mr. Eichenhorst made the rounds and found everything to be in order.

Around 2 o'clock in the morning the quartermaster reported to III mate Mr. Rieger that the two prisoners have escaped.

The III mate immediately reported this to Mr. Oertel. An immediate search revealed the fact that, although the watchman was at his post in front of the locked door, the Hospital was empty.

As already mentioned, only the pier watchman had the keys.

Unreadable sign. Master.

Translated from German, Ellis Island, April 24, 1930.
/s/ Armand Lorant, Interpreter.

Copied—AK.

Copy

Notice to Deliver, Detain on Board, or Remove Aliens

U. S. Department of Labor,

Immigration Service

Port of New York, 4/15/1930.

To the Owner, Agent, Consignee, Master or Officer in Charge of the SS Milwaukee, Hamburg American Line:

Pursuant to the provisions of the Acts of February 5, 1917, December 26, 1920, and May 26, 1924, and the Immi- [fol. 18] gration Regulations issued by the Secretary of Labor thereunder, you are hereby directed to detain on board S. S. Milwaukee the following-named aliens, with their baggage, your attention being invited to the appropriate sections of the statute appearing on the reverse side hereof:

Name, Abraham Silber; Status on Vessel, Galleyman—Age 23. Member of Crew. Has not established that he has no intention to abandon his calling.

By direction of the Immigration Officer in Charge.

/S/ (illegible), U. S. Immigrant Inspector.

Receipt of the above notice is hereby acknowledged.

/S/ (illegible), Signature.

Copied—AK.

[fol. 19] Duplicate

Notice of Liability for Fine Under U. S. Immigration Laws,

U. S. Department of Labor

Immigration Service

99179/394

Office of Commissioner, Port of New York

April 25, 1930.

To Hamburg American Line, Agents of the Vessel "Milwaukee" 4/15/30, 39 Broadway, N. Y. C.

In conformity with the requirements of Rule 22 of the Immigration Regulations, you are hereby notified that the

evidence on file with respect to the alien named below, who arrived on the ship and date named above, indicates that a fine should be imposed under Sections 19 and 20 of the Act of 1924, on the grounds stated hereunder.

If you desire a hearing, as to whether a fine should be imposed in this instance, you will be allowed 60 days from the date of this notice for that purpose, and the vessel on which the said alien arrived will be granted clearance papers when she is ready to sail and allowed to proceed upon her outward-bound voyage upon condition that you deposit with the collector of customs at this port, prior thereto, the sum indicated below as security for the payment of the said fine should it be imposed.

Please submit protest in duplicate.

[fol. 20] Name of alien: Abraham Silber, 23m galleyman.

Amount required to be deposited: $1,000.

Basis for proposed fine: Failure to detain on board, after service of order to do so.

Benj. M. Day, Commissioner.

AK.

Received the above notice May 2, 1930.

Hamburg-American Line, Per J. Krive.

Witness, John Galley.

Hamburg-American Line

Operating Department

Pier 86, North River

Foot of West 46th Street

New York

August 12th, 1930.

Commissioner of Immigration, Ellis Island, N. Y.

SIR:

In reference to your fine notice No. 99179/394 relating to the case of Abraham Silber ex ms Milwaukee, April 15th, 1930, we beg to request that the papers be forwarded to the Department of Labor in Washington with notice that our attorney there, Mr. Roger O'Donnell, will appear and

[fol. 21] present suitable defense to the proposed penalization.

Respectfully yours, Hamburg American Line, G. Koetter, Operating Manager.

GK/R.

Law Office of

Roger O'Donnell,

Westory Building, Washington, D. C.

June 26, 1930.

The Honorable The Secretary of Labor, Washington, D. C.

SIR:

Entry of Appearance is hereby made in the case of the person named below, which is to come before the Department of Labor on fine proceedings.

Name: Abraham Silber, ss "Milwaukee" 4/15/30.

Port: New York, N. Y.

I will appear as attorney for the Hamburg American Line in the above proceedings.

Upon receipt of the record, advices are requested by the undersigned.

Respectfully, Roger O'Donnell.

[fol. 22] Law Office of

Roger O'Donnell,

Westory Building, Washington, D. C.

September 2, 1930.

HAL # Op.

Commissioner-General of Immigration, Department of Labor, Washington, D. C.

File No. 55733/53

SIR:

This file relates to a fine notice served on the Hamburg-American Line under date of April 25, 1930, based on Sections 19 and 20 of the Act of 1924, for alleged failure to

detain on board one Abraham Silber, a member of the crew of the M. S. "Milwaukee," arriving at New York on April 15, 1930.

The record shows that this notice to detain was given to the chief officer of the vessel and no notice whatever was given to the owner, charterer, agent, consignee, or master of the vessel, as required by the plain terms of Section 20.

There is no authority in law for constructive service upon the persons named in the statute, and the recent decision of the Circuit Court of Appeals for the Second Circuit in the case of United States v. J. H. Winchester & Co., Inc., shows this to be the case and points out that this highly penal statute must be construed strictly.

[fol. 23] The first officer of a ship is not an agent of the owners and service of notice upon him does not charge the owners with the notice which the statute obviously requires.

It is therefore clear that no penalty was incurred, and the fine notice should be withdrawn. Protest is made accordingly, and all legal rights reserved on behalf of the Hamburg-American Line.

Respectfully, Roger O'Donnell, Attorney for the Hamburg-American Line.

ROD:jr.

Ellis Island.

55733/53 October 10, 1930.

In re: S. S. "Milwaukee," April 15, 1930

Alien: Abraham Silber

This case comes before the Board of Review in fine proceeedings.

No hearing. Attorney Roger O'Donnell interested.

This record relates to a fine proceeding under Section 20 of the Act of 1924 against the S. S. "Milwaukee" at New York on April 15, 1930, incident to the failure of the master of the vessel to detain on board and deport the alien seaman, Abraham Silber, after an order to do so had been served upon the said master.

[fol. 24] In the protest made to the imposition of fine it is not denied that there was a violation of law. It is claimed, however, that under the ruling of the Circuit Court of Appeals for the Second Circuit in the Winchester case the Hamburg American Line, who was served with the notice of intention to fine, cannot be held responsible for the viola-

tion of law which occurred, inasmuch as the original notice to detain on board was not given to the line. The argument goes to the question of collecting the penalty. It is assumed that when the violation of law became known, clearance was withheld, and the master, or interested parties in his behalf, filed bond to cover the amount of the proposed penalty. If such is the case, it is not seen how the decision in the Winchester case in any way prevents collection of the penalty.

In order that the facts may be before the Department in the determination of the case, Ellis Island should be requested to advise whether or not bond has been filed in the case to cover the amount of the proposeed fine, and if so, the party primarily responsible under the bond.

It is recommended that Ellis Island be requested to advise whether or not bond has been filed in the case to cover the amount of the proposed fine, and if so, the party primarily responsible under the bond.

L. Paul Winings, Chairman, Secy. & Comr., Genl's Board of Review.

JS:hb.

So ordered.

P. F. Snyder, Assistant to the Secretary.

[fol. 25] U. S. Department of Labor,

Bureau of Immigration,

WASHINGTON

55733/53.
C

October 20, 1930.

Commissioner of Immigration, Ellis Island, N. Y. H.

The Bureau acknowledges the receipt of your letter No. 99179/394 relating to the appeal case of fine proceedings in the case of Abraham Silber, ex S. S. "Milwaukee," April 15, 1930.

After careful consideration of the evidence presented in the record, the Department has directed that you be requested to advise whether or not bond has been filed in the

case to cover the amount of the proposed fine, and if so, the party primarily responsible under the bond.

(Sighed) Harry E. Hull, Commissioner General.

Oct. 20, 1930.

OB.

[fol. 26] U. S. Department of Labor,

Immigration Service,

Office of Commissioner of Immigration, Ellis Island, New York Harbor, N. Y.

In answering refer to No. 99179/394

October 27, 1930.

Commissioner General of Immigration, Washington, D. C.

In response to your letter of the 20th instant, No. 55733/53C, relative to the case of Abraham Silber, ex S. S. "Milwaukee" April 15th, 1930, you are advised that according to information received from the Collector of Customs at this port, the Hamburg-American Line has a bond on deposit at that office to cover all Act of 1924 fines.

Byron H. Uhl, Assistant Commissioner of Immigration, New York District.

AK.

Ellis Island

55733/53. February 13, 1931.

In re: S. S. "Milwaukee," April 15, 1930.
Alien: Abraham Silber.

This case comes before the Board of Review for further consideration in fine proceedings.

No hearing. Attorney Roger O'Donnell interested.

This record relates to a fine proceeding under Section 20 of the Act of 1924 against the S. S. "Milwaukee" at New [fol. 27] York on April 15, 1930, incident to the failure of the master of the vessel to detain on board and deport the alien seaman, Abraham Silber, after an order to do so had been served upon the said master.

When this case was considered by the Department on October 10, 1930, it was found that there had been a viola-

tion of the provisions of Section 20 of the Act of 1924 and that the penalty named therein had been incurred. The defense, however, was submitted by the line that under the ruling of the Circuit Court of Appeals in the Winchester case the line could not be held liable for the penalty inasmuch as notice to detain on board had not been served on the line.

It appears from a report received from the port that the line in question has a blanket bond filed with the Collector of Customs guaranteeing the payment of all fines which may be incurred under the immigration laws. If the bond covers all fines which may be ordered imposed against a vessel of the line it is not seen how the rule laid down in the Winchester decision applies. The question before the Court in the event legal steps become necessary to collect the fine is whether or not the bond filed covers all fines which may be incurred by any ships of the line, including the fine in this proceeding. That issue is not for the Department's determination.

It is recommended that fine be imposed. The sum involved is $1,000.

L. Paul Winings, Chairman, Secy. & Comr., Genl's Board of Review.

JS:HB

So ordered:

W. N. Smelser, Assistant to the Secretary.

[fol. 28] In United States District Court, Southern District of New York

[Title omitted]

Assignment of Errors

Now comes the plaintiff by John M. Lyons, its attorney herein, and says that the District Court of the United States for the Southern District of New York in rendering the judgment herein, dated February 24, 1934, in favor of the defendant against the plaintiff, erred in the following respects, to wit:

First. That the Court erred in dismissing the complaint herein and in directing judgment for the defendant.

Second. That the Court erred in granting defendant's motion for a directed verdict herein.

Third. That the Court erred in holding that the Secretary of Labor was not arbitrary in imposing fines on the plaintiff under Section 20 of the Immigration Act of 1924 and Section 32 of the Immigration Act of 1917.

Fourth. That the Court erred in holding that by the provisions of Section 20 of the Immigration Act of 1924 it is not required that the inspection of alien seamen be made [fol. 29] by the Immigration Officer-in-Charge at the port of arrival—in this instance the Commissioner of Immigration at the Port of New York.

Fifth. That the Court erred in holding that the fine notice was not worthless unless issued by the Immigration Officer-in-Charge at the port of arrival.

Sixth. That the Court erred in not holding that the owner, charterer, agent, consignee or master, to become liable to a fine under Section 20 of the Immigration Act of 1924 for the escape of an alien seaman, must be individually ordered to detain the seaman on board.

Seventh. That the Court erred in not holding that in order to lay the basis for the imposition of a fine under Section 20 of the Immigration Act of 1924 against the owner of the vessel for the escape of an alien seaman, the notice to detain the seaman and the notice of intention to fine must both be served on the owner, plaintiff herein.

Eighth. That the Court erred in holding that there was sufficient evidence in the records before the Secretary of Labor upon which to predicate a fine for the escape of the alien seaman involved herein.

Ninth. That the Court erred in holding that notice to the master of the vessel is sufficient notice to the owner.

[fol. 30] Wherefore, the plaintiff prays that the judgment herein in favor of the defendant be reversed and held for naught and that the plaintiff be restored to all things which it has lost by reason of the said judgment.

Dated, New York, N. Y., May 8, 1934.

John M. Lyons, Attorney for Plaintiff, Office & P. O. Address, 27 William Street, Borough of Manhattan, New York City.

In United States District Court, Southern District of New York

[Title omitted]

Petition for and Allowance of Appeal

Now comes the plaintiff, Hamburg-American Line, and says that on the 24th day of February, 1934, the Court entered judgment herein against it dismissing the complaint [fol. 31] on its merits, and that by such judgment certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear from the assignment of errors filed with this petition.

Wherefore, the plaintiff prays for an appeal from the said judgment to the United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of and for the allowance of the appeal and for leave to prosecute the same, and that a transcript of the record and proceedings in this cause, duly authenticated, be forwarded to the said Circuit Court of Appeals.

Dated, New York, N. Y., May 9, 1934.

John M. Lyons, Attorney for Plaintiff, Office & P. O. Address, 27 William Street, Borough of Manhattan, New York City.

The foregoing appeal is hereby allowed.

Dated, New York, N. Y., May 9th, 1934.

Robert P. Patterson, U. S. D. J.

[fol. 32] Citation in usual form omitted in printing.

[fol. 33] In United States District Court, Southern District of New York

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled action, as agreed upon by the parties.

Dated, New York, June 8, 1934.

John M. Lyons, Roger O'Donnell, Attorneys for Plaintiff-Appellant. Martin Conboy, United States Attorney, Attorney for Defendant-Appellee.

[fol. 34] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 35] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1934

Nos. 52, 97

Argued Nov. 20, 1934. Decided Dec. 10, 1934

COMPAGNIE GENERALE TRANSATLANTIQUE, Appellant,

v.

PHILIP ELTING, Collector of Customs at the Port of New York, Appellee

HAMBURG-AMERICAN LINE, Appellant,

v.

PHILIP ELTING, Collector of Customs at the Port of New York, Appellee

Appeals from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Swan, Circuit Judges

Suits to recover penalties imposed for violation of the Immigration Act of 1924 (section 20 [8 U. S. C. A. § 167]). Judgments for defendants; plaintiffs appeal. Affirmed.

Roger O'Donnell, of Washington, D. C., and John M. Lyons, of New York City, for appellants.

Martin Conboy, U. S. Atty., of New York City (George B. Schoonmaker, Asst. U. S. Atty., of New York City, of counsel), for appellee.

MANTON, Circuit Judge:

These cases involve similar questions and will be considered in one opinion. In Compagnie Generale Transatlantique, the steamship Ile de France arrived at the port of New York February 6, 1930, having on board alien seamen. The immigration inspector boarded the vessel, examined the crew, and directed the detention of 102 members because they did not establish to his satisfaction that they were bona fide seamen. An order of detention was served upon the fourth officer of the vessel and also a

person designated as commander. Thereafter two of the seamen ordered detained escaped.

In the Hamburg-American Line Case, the steamship Milwaukee arrived at the port of New York April 15, 1930, with one alien seaman who did not establish to the satisfaction of the immigration inspector, who boarded the vessel upon arrival, that he had no intention of abandoning his calling. A notice of detention was served on the first officer of the vessel directing the detention of this seaman. Later he escaped.

Notice of hearing in the first case was given to the appellant, the owner of the vessel, designated as the "French Line, Agent of the Vessel 'Ile de France.'" Appellant, by counsel, appeared before the Department of Labor and protested against the fine. In the Hamburg-American Line Case, the notice was served upon this appellant, owner of the vessel, designated in the notice as the "Hamburg-American Line, Agents for the Vessel 'Milwaukee.'" It appeared before the Department of Labor, and its attorney protested against the imposition of the fine, alleging that the order of detention served on the first officer was invalid, asserting that there could be no constructive notice of the order to detain and that the first officer of the ship [fol. 36] was not the agent of the owners. After the imposition of the fines, they were paid to obtain clearance of the vessels.

The officer served on each vessel was in charge of that vessel at the time of the service of the order of detention. In the Hamburg-American Line Case, it was the inspector's duty to serve the order on the officer who had the responsibility and control of the crew for the detention of any one of them on board. Ordinarily this is the master. When the master is not in charge of the vessel presumably it is the first officer who takes the master's place. United States v. Chemical Foundation, 272 U. S. 1, 47 S. Ct. 1, 71 L. Ed. 131. In the Hamburg-American Line Case, in any event, the master's report shows that he had notice of the order long before the alien escaped, and that he acted upon it. He was required to obey the order of detention and failed to do so.

In the Compagnie Generale Transatlantique Case, the notice was sufficient as served. The owner was charged with the master's or commander's delinquency. It had

notice that the fine would be collected from it and was represented by the attorney who unsuccessfully protested. For the reasons stated in the British Empire Steam Navigation Co. Case (C. C. A.) — F. (2d) —, and the Societe Ligure Di Aramento Case (C. C. A.) — F. (2d) —, decided this day, there were no errors below.

Judgments affirmed.

[fol. 37] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 17th day of December, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

HAMBURG-AMERICAN LINE, Plaintiff-Appellant,

vs.

PHILIP ELTING, as Collector, etc., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 38] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Hamburg-American Line vs. Philip Elting, as Collector, etc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 17, 1934. William Parkin, Clerk.

[fol. 39] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 38, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Hamburg-American Line, Plaintiff-Appellant, against Philip Elting, as Collector, etc., Defendant-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 16th day of January, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 40] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 29, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,411, 39,412. U. S. Circuit Court of Appeals, Second Circuit. Term No. 6. Compagnie Generale Transatlantique, Petitioner, vs. Philip Elting, Collector of Customs, Port of New York. Term No. 7. Hamburg-American Line, Petitioner, vs. Philip Elting, Collector of Customs, Port of New York. Petition for writs of certiorari and exhibits thereto. Filed March 15, 1935. File No. 6 O. T. 1935, 7 O. T. 1935.

FILE COPY

FILED
MAR 15 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. [redacted] 6

COMPAGNIE GENERALE TRANSATLANTIQUE,
Petitioner,

vs.

PHILIP ELTING, Collector of Customs, Port of New York.

No. [redacted] 7

HAMBURG-AMERICAN LINE,
Petitioner,

vs.

PHILIP ELTING, Collector of Customs, Port of New York.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Roger O'Donnell,
Counsel for Petitioners.

William J. Peters,
Lambert O'Donnell,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 783

COMPAGNIE GENERALE TRANSATLANTIQUE,
Petitioner,

vs.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK.

No. 784

HAMBURG-AMERICAN LINE,
Petitioner,

vs.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MAY IT PLEASE THE COURT:

The petition of the Compagnie Generale Transatlantique and the Hamburg-American Line respectfully shows to this Honorable Court:

The Essential Facts.

1. These are suits involving substantially identical facts and law, and were originally brought in the United States District Court for the Southern District of New York, to recover from the respondent, as Collector of Customs for the port of New York, three fines of $1,000 each alleged to be unlawfully assessed and which were collected from the petitioners, respectively, by the said official. Such suits arose out of the following facts:

2. In the case of Compagnie Generale Transatlantique the immigration authorities at the port of New York issued an order, purporting to be pursuant to Section 20 of the Immigration Act of 1924 (8 U. S. C., 167), directing the detention of 102 members of the crew of the steamship "Ile de France" (R. 29). This notice was served upon the fourth officer of the vessel (R. 28) and there was no notice served upon the master, charterer, agent, owner or consignee of the vessel. Two of the crewmen effected their escape in some manner not disclosed and could not be located when the vessel sailed.

3. In the case of the Hamburg-American Line, the immigration inspector issued an order (R. 17-18), purporting to be under the same statute as previously mentioned, directing the detention on board the vessel of one member of the crew; such order was not served upon any of the persons mentioned in the statute, but was delivered to the first officer of the ship at the time the vessel arrived in New York. The seaman effected his escape in some manner unknown.

4. Subsequently, the petitioners, respectively, were cited to show cause why they should not be assessed a penalty of $1,000 for each seaman, and sixty days were allowed for the submission of a defense by the petitioners.

5. Thereafter the petitioners submitted defenses (R. 37-39 and R. 22-23) to the notices above mentioned, which were directed to the *agents* of the respective vessels, neither of whom had been served with notices to detain the alien crewmen mentioned.

6. The defenses of the petitioners were rejected (R. 39-40 and R. 23-24) and the petitioners were required to pay $3,000 upon demand, as an alternative to refusal of clearance to their respective vessels.

7. Thereafter these suits were brought and upon a trial upon the official record, judgment was entered for the respondent in each case, with exceptions to the petitioners. The cases were tried together and were decided at the same time.

8. The Circuit Court of Appeals for the Second Circuit affirmed the decision of the District Court, for reasons set forth in an opinion by Manton, Circuit Judge (R. 50-51 and R. 35-37), and reported in 74 Fed. 2d, p. 209.

Reasons for Granting the Petition.

9. The decision below creates a direct conflict with the Circuit Court of Appeals for the Fifth Circuit, as set forth in the case of *Sinclair Navigation Company* v. *United States,* 32 F. (2d) 90. In that case there was a fine of $1,000.00 imposed against the carrier under the same provision of the statute as in the cases covered by this petition, for the escape of a seaman as to whom there had been no detention notice served upon the master of the vessel. The Circuit Court of Appeals for the Fifth Circuit held that in the absence of appropriate notice to detain the seaman on board the vessel the statutory penalty could not properly be imposed against the owner.

Furthermore, the decision below is in direct conflict with a decision by the same court in the case of *Lancashire Shipping Company, Ltd.*, v. *Elting*, 70 F. (2d) 699, in which it was held that both the detention notice and citation to show cause why a penalty should not be imposed must be served upon the person sought to be charged.

The petitioners therefore invoke Rule 38, Section 5, of the Rules of this Honorable Court, and suggest that the conflict of decisions as hereinbefore set forth is sufficient to justify the granting of this petition.

Jurisdiction.

10. The order for mandate below was entered on December 17, 1934 (R. 52 and 37, respectively).

11. Jurisdiction of this Court is provided by 28 U. S. C., Sec. 347 (a).

Statute Involved.

12. The statute involved is the Immigration Act of 1924 (8 U. S. C., Sec. 167). The particular part of that statute having a bearing upon the cases covered by this petition is Sub-section (a) of Section 167, which is set forth in the appendix hereof.

Questions Presented.

13. Whether the Secretary of Labor is justified in imposing upon a carrier a fine for the escape of an alien member of a vessel's crew as to whom notice to detain on board has not been served upon the master of the vessel.

14. Whether the Secretary of Labor is justified in imposing upon the owner, charterer, agent or consignee of a vessel a fine for the escape of an alien member of the vessel's crew as to whom notice to detain such alien on board the vessel had not been served upon such owner, charterer, agent or consignee.

15. Whether the requirements of due process of law are met by a citation to the owner or agent of a vessel to show cause why a fine should not be imposed, notwithstanding the absence of notice to such owner or agent that an alien member of a crew was required to be detained on board such vessel.

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 52, Compagnie Generale Transatlantique, Plaintiff-Appellant, v. Philip Elting, Collector of Customs, Port of New York, Defendant-Appellee, and the case numbered and entitled on its docket No. 97, Hamburg-American Line, Plaintiff-Appellant, v. Philip Elting, Collector of Customs, Port of New York, Defendant-Appellee, and that the said judgment of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

COMPAGNIE GENERALE TRANSATLANTIQUE,
HAMBURG-AMERICAN LINE,
By ROGER O'DONNELL,
Counsel for Petitioners.

LAMBERT O'DONNELL,
WILLIAM J. PETERS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 783

COMPAGNIE GENERALE TRANSATLANTIQUE,
Petitioner,

vs.

PHILIP ELTING, Collector of Customs, Port of New York.

No. 784

HAMBURG-AMERICAN LINE, *Petitioner,*

vs.

PHILIP ELTING, Collector of Customs, Port of New York.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in *Compagnie Generale Transatlantique v. Elting, Collector of Customs* and *Hamburg-American Line v. Same,* 74 F. (2d) 209 and is printed in each of the records herein (R. 50 and R. 35).

The contrary opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in *Sinclair Navigation Company* v. *United States*, 32 F. (2d) 90.

II.

Jurisdiction.

1. The order for mandate below was entered on December 17, 1934 (R. 52 and 37, respectively).

2. Jurisdiction of this Court is provided by 28 U. S. C., sec. 347 (a) and is supported by the action of this Honorable Court in hearing and determining the case of *Hamburg-American Line* v. *United States*, 291 U. S. 420, 54 S. Ct. 491, 78 L. Ed. 887, involving interpretation of the Immigration Act of 1924, 8 U. S. C. A., sec. 216.

III.

Statement of the Facts.

The substantial facts have been set out in the petition to which this is appurtenant (*supra*. p. 2) and in the interest of brevity are not repeated at this point.

IV.

Specification of Errors.

A. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that "The officer served on each vessel was in charge of that vessel at the time of the service of the order of detention." This conclusion finds no support whatever in the record.

B. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the master of a vessel is charged with the duty of obeying an order of detention not served upon him, but upon some subordinate officer of the vessel.

C. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the owner of a vessel is charged with penal responsibility for a master's or commanding officer's delinquency in failing to obey a notice to detain an alien seaman on board the ship, when the master is independently charged with such duty under the terms of the statute.

D. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the owner or agent of a vessel is charged with penal responsibility for the escape of a seaman ordered detained, in the absence of any notice to such owner or agent requiring such seaman to be detained on board the vessel.

E. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the notice to an owner or agent of an intention to impose an administrative fine, with a citation to show cause to the contrary, is due process of law, in the absence of express notice to such owner or agent, thus sought to be charged, requiring such alien seaman to be detained on board the vessel upon which he arrived.

F. The petition for a writ of certiorari should be granted.

V.

ARGUMENT.

Point A. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that "The officer served on each vessel was in charge of that vessel at the time of the service of the order of detention." This conclusion finds no support whatever in the record.

The record is completely silent as showing that the masters of the respective vessels involved in these cases were not present and available for service of detention notices at

the time of the arrival of the respective ships. The records show that the detention notices by an immigration officer were prepared on the same day that the ship arrived and in the one case (*Compagnie* v. *Elting*, R. 28) the record shows receipt of notice by the fourth officer of the vessel, while in the other (*Hamburg* v. *Elting*, R. 22) the uncontradicted protest shows only service of notice upon the first officer of the vessel. No evidence was introduced on behalf of the defendant indicating that the master of either vessel was not available for the receipt of service of notice to detain the respective alien seaman. The statement in the opinion of the Circuit Court of Appeals is therefore volunteered and unsupported by evidence. It is submitted that this error goes to the substance of the cases covered by this petition, as the elimination of this erroneous conclusion restores the record to showing that there was no service of notice to detain upon the owner, charterer, agent, consignee or master of the vessel, those being the persons required to be served with such notice by Section 20 (a) of the Immigration Act of 1924, 8 U. S. C., Sec. 167 (a).

Point B. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the master of the vessel is charged with the duty of obeying an order of detention not served upon him, but upon some subordinate officer of the vessel.

The words of the statute, cited *supra*, are that

> The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof * * * who fails to detain such seaman on board after such inspection or to deport such seaman *if required by such immigration officer* or the Secretary of Labor to do so, shall pay to the collector of customs, etc. (Italics volunteered).

This statute clearly and patently prescribes that the respective parties named shall be "required" to detain the seaman on board the vessel. The word "require" is defined in the Standard Dictionary to mean "To demand, or to request authoritatively."

> The primary definition of "require" is to demand, to insist, to ask as a favor, to request. *Tennessee Coal, Lumber and Tanbark Company* v. *Waller*, 37 Fed. Rep. 545 (547).

Furthermore, the Circuit Court of Appeals for the Second Circuit, which decided the case that is the subject of this petition, ruled in the case of *Lancashire Shipping Company, Ltd.* v. *Elting, Collector, etc.*, 70 F. (2d) 699 (701) as follows:

> In order to lawfully impose a fine, it must appear that the *party required to detain the seaman* has been served with a detention order. (Italics supplied.)

The case of *Sinclair Navigation Company* v. *United States*, 32 F. (2d) 90 (C. C. A. 5th Circuit) involved a fine proceeding under the same statute invoked in the case covered by this petition. The master of the vessel had been orally ordered to convey an alien seaman to the hospital for treatment, but he escaped and the court found that "No written notice had been served on the master of the steamship to detain the alien on board the vessel." The court ruled (p. 91) that as there had been no order to detain the seaman on board in fact made would be sufficient to show the illegality of the assessment of the fine.

The foregoing rulings are plainly consonant with the language of the statute, which requires that notice to detain shall be given to the party or parties named in the statute, in order to charge them with liability accruing from breach of such notice.

As the records in the instant cases clearly show that the "requirement" of the statute was not brought home even to the masters of the vessels, by demand served upon them to detain the seamen on board the respective ships, it is submitted that the holding of the court below that the masters were nevertheless charged with responsibility to detain on board is reversible error and ought not to be allowed to stand.

C. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the owner of a vessel is charged with penal responsibility for a master's or commanding officer's delinquency in failing to obey a notice to detain an alien seaman on board the ship, when the master is independently charged with such duty under the terms of the statute.

The court below states "The owner was charged with the master's or commander's delinquency" (R. 36, fol. 36). In making this conclusion the court set at naught its own previous rulings in several cases involving the same point. It had ruled in the case of *Lancashire Shipping Company, Ltd.*, v. *Elting, Collector, etc.*, 70 F. (2d) 699, as follows, p. 701:

> To impose the fines, it is essential to show that the detention notice and the notice of hearing was served upon the agent. *United States* v. *Columbus Marine Corporation*, 62 F. (2d) 795; *United States* v. *J. H. Winchester & Co.*, 40 F. (2d) 472. * * * In order to lawfully impose a fine, it must appear that the party required to detain the seaman had been served with a detention order and that notice had been given him of the government's intention to assess a fine; thus there may be opportunity to be heard. Since the detention order was served on the ship's master and the notice of liability directed to the agent only, the necessary conditions for a lawful fine were not met. To bind the owner, intention to assess the fine must be plainly di-

> rected to him. The owner must be advised that he is the one who is required to pay. * * *
>
> The agent's filing of a protest was not a ratification of the master's authority to accept the detention notice on its behalf. The master was not the representative of the agent and in accepting service of the detention order, he may not be assumed to have acted for it. *The master is a party under the statute made liable for his violation. He must be regarded as acting in his individual capacity in taking the order.* (Italics volunteered.)

In *United States* v. *Columbus Marine Corporation*, 62 F. (2d) 795, the Circuit Court of Appeals for the Second Circuit held (p. 796):

> Each person must be ordered to detain the seaman, on whom any duty was to be imposed.

In *United States* v. *J. H. Winchester & Co., Inc.*, 40 F. (2d) 472, the Circuit Court of Appeals for the Second Circuit held (p. 473), Swan, Circuit Judge, speaking for the majority of the court:

> To the majority of the court it seems reasonable to believe that Congress did not intend to impose the penalty for failure to heed the inspector's demand *unless the demand was brought home to the person sought to be charged,* by notice to him or his authorized agent. Had Congress wished to impose the more stringent obligation it could readily have found an apt expression, by using the phrase "if the master be required." It is true that convenience of enforcement would be served by holding that notice to the master is notice to all, but Congress provided what it evidently thought to be an adequate remedy for collection by authorizing the withholding of clearance of the vessel, and mere convenience of enforcement cannot justify a strained construction of the language used. To us the appellant's contention requires, not an interpretation of the language used, but an addition of words by im-

> plication, so that it shall read, as above suggested, "if the master be required." Such an amendment by implication we do not think justified in a penal statute, where, if the language is ambiguous, the courts lean in favor of the defendant (citing numerous authorities).

From the foregoing it is obvious that the Circuit Court of Appeals for the Second Circuit is in a state of hopeless confusion as to what the statute really requires, and it is therefore submitted that the decision toward the reversal of which this petition is directed has decided an important question of local law in a way probably in conflict with applicable local decisions and has also decided an important question of general law in a way that is probably untenable and in conflict with its own previous well-considered rulings upon similar cases. Hence it is further submitted that it is a matter of public importance to have this statute authoritatively interpreted by this Honorable Court.

D. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the owner or agent of a vessel is charged with penal responsibility for the escape of a seaman ordered detained, in the absence of any notice to such owner or agent requiring such seaman to be detained on board the vessel.

The decision of the court below attempts to apply the doctrine of constructive notice by holding that notice to a subordinate officer of a vessel to detain an alien seaman on board the ship is at once notice to the owner or agent of the vessel.

The very first notice of any kind to the owner or agent in the cases forming the subject of this petition was a citation to show cause why a fine of $1,000 should not be imposed for each seaman not detained. The same court which decided this case decided the case of *Lancashire Shipping Company,*

Ltd., v. *Elting, Collector, etc.*, 70 F. (2d) 699, and held that constructive notice did not exist in these cases, stating (p. 701):

> The agent's filing of a protest was not a ratification of the master's authority to accept the detention notice on its behalf. The master was not the representative of the agent and in accepting service of the detention order he may not be assumed to have acted for it. The master is a party under the statute made liable for his (its) violation. He must be regarded as acting in his individual capacity in taking the order.

If that is a correct statement of the law when the master was in fact served with the detention order, it is obvious that it is still more correct when, as in the cases at bar, there was no service of notice upon the masters of the respective ships—in one case it was the fourth officer who was served and in the other case the first officer, both subordinate officials of the vessel and neither acting as master at the time, so far as the record shows.

It therefore appears obvious that the decision for the reversal of which this petition is directed is in error when it vicariously charges the owner or agent with notice to detain an alien member of a crew on board the vessel.

An identical situation existed in the case of *Navigazione Libera Triestine Societa Anonima* v. *Elting*, 4 Fed. Supp. 951, which terminated in the United States District Court for the Southern District of New York in a well-considered opinion by Goddard, J., who disposed of the question of reflected or constructive liability to penalization as follows (p. 953):

> The owner, charterer, agent, consignee, or master who fails to detain alien seamen "if required" to detain an alien by the immigration officer or the Secretary of Labor shall pay $1,000 if the alien is not detained. However, there are two conditions precedent that must

> be fulfilled before a valid fine may be imposed upon any one. He must first be "required" to detain the seaman, and the government must give him notice of its intention to assess a fine against him, with opportunity of being heard. * * * The only notice of the government's intention to fine anyone was the notice addressed to and served upon "Columbus Marine Corporation, Agent of the vessel 'Isarco' ". It is therefore plain that no valid fine was assessed against the owner, the plaintiff.

In the cases forming the subject of this petition the notices of intention to assess a fine were addressed to and served upon "French Line, Agent of the Vessel 'Ile de France' " (R. 32) and "Hamburg-American Line, Agents of the Vessel 'Milwaukee' " (R. 19), and this was the first notice of any kind so served. The present suits are brought by the owners of the respective vessels, who were never served with notice of any kind, either to detain the seamen or to show cause why penalties should not be imposed. It is therefore submitted that the imposition of any penalty under such circumstances was improvident, unlawful and a capricious act on the part of the Secretary of Labor.

E. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the notice to an owner or agent of an intention to impose an administrative fine, with a citation to show cause to the contrary, is due process of law, in the absence of express notice to such owner or agent, thus sought to be charged, requiring such alien seaman to be detained on board the vessel upon which he arrived.

As laid down by District Judge Goddard in the case of *Navigazione, etc.,* v. *Elting,* 4 Fed. Supp. 951, and quoted *supra* (pp. 15-16), there are two conditions precedent which must be fulfilled before a valid fine may be imposed; first, there must be the requirement to detain the seaman, and

then a notice upon the same authority of an intention to impose the administrative fine.

There is not the scintilla of evidence that any detention notice was served upon the owner, charterer, agent, or consignee of either of these vessels, and it is submitted that in this matter the well-known doctrine of *scienter* should be applied and that no guilty knowledge of official requirement is to be presumed in the absence of express notice to detain the seaman. Due process of law would, in all reason, seem to require that the owner or agent, sought to be charged, should be given that notice which would put them on their guard and give rise to the duty to detain the seaman at their peril. To adopt any other view means the amendment of the statute to the point where notice to any one of the parties named therein is notice to all. Such a proposition is obviously absurd and the absurdity of it is made plain by the ruling of the same court which decided these cases, in the case of *United States* v. *J. H. Winchester & Co. Inc.*, cited *supra* (p. 13), and from which ruling the pertinent portion is there quoted.

F. The petition for writs of certiorari should be granted.

Respectfully submitted,

ROGER O'DONNELL,
Counsel for Petitioner.

WILLIAM J. PETERS,
LAMBERT O'DONNELL,
Of Counsel.

March 12, 1935.

APPENDIX.

Immigration Act of 1924, 8 U. S. C., Sec. 167.

Sec. 20. (a) The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seamen (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof, approved by the collector of customs.

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APR 15 1935
CHARLES ELMORE CROPLEY
CLERK

Nos. ~~700~~ 6 and ~~701~~ 7

In the Supreme Court of the United States

OCTOBER TERM, 1934

COMPAGNIE GENERALE TRANSATLANTIQUE, PETITIONER

v.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK

HAMBURG-AMERICAN LINE, PETITIONER

v.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 783

COMPAGNIE GENERALE TRANSATLANTIQUE, petitioner

v.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF New York

No. 784

HAMBURG-AMERICAN LINE, PETITIONER

v.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF New York

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

In the case of the Compagnie Generale Transatlantique, No. 783, the only opinion rendered by the District Court was an oral opinion (R. 21–26).

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 50–52) is reported in 74 F. (2d) 209.

In the *Hamburg-American Line case,* No. 784, the court rendered a short oral opinion referring to its opinion in the *Compagnie Generale Transatlantique case* (R. 12). The opinion of the Circuit Court of Appeals for the Second Circuit (R. 35–37) is reported in 74 F. (2d) 209.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered December 17, 1934 (R. 52, Compagnie Generale Transatlantique; R. 37, Hamburg-American Line). The petition for writs of certiorari was filed March 15, 1935. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the circumstances presented in these cases, a fine was lawfully imposed upon each of the petitioners by the Secretary of Labor under Section 20 of the Immigration Act of 1924 where the order for detention of alien seamen was served on an officer of the vessel other than the master thereof and notice of liability to fine was served on the owner of the vessel.

STATUTE INVOLVED

The applicable portions of the statute involved are set forth in the Appendix, *infra,* p. 11–12.

STATEMENT

The facts as disclosed by the record in the Compagnie Generale Transatlantique case, No. 783, may be summarized as follows (R. 3–42);

The petitioner Compagnie Generale Transatlantique, a foreign corporation, was the owner of the S. S. *Ile de France* (R. 4), which vessel arrived at the port of New York on or about February 6, 1930 (R. 4), having on board alien seamen. On February 6, 1930, a United States immigration officer boarded the vessel, inspected the crew, and it not having been established to his satisfaction that 102 alien members of the crew had no intention of abandoning their calling as seamen, and it appearing that they were not on the visa crew list (R. 28–29), served upon the fourth officer of the vessel, and also upon the person designated as the commander, an order to detain such seamen on board (R. 28). Two of these alien seamen escaped from the vessel, illegally entered the United States, and were not on board the vessel when it sailed on February 7, 1930 (R. 31).

The French Line, the petitioner here, on February 19, 1930, was served with notice of liability to fine in the amount of $2,000 under the provisions of Sections 19 and 20 of the Immigration Act of 1924 (R. 20, 32–33). The petitioner thereupon appeared by its attorney (R. 34), and objected to the imposition of the fine (R. 37–39). On May 17, 1930, this case came before the Board of Review in fine proceedings (R. 39). It was recommended

that a fine of $2,000 be imposed, and it was so ordered by the Secretary of Labor (R. 40–41). The petitioner, in order to obtain clearance of the vessel, paid to the respondent under protest the sum of $2,000 (R. 6, 9). Thereafter the petitioner brought suit in the District Court of the United States for the Southern District of New York to recover the fine imposed (R. 2–11). The case was submitted to the court upon the pleadings and one exhibit. Both sides moved for a directed verdict. The court directed a verdict for the respondent (R. 25–26), and judgment was entered dismissing the complaint on the merits (R. 16–17). On appeal the Circuit Court of Appeals for the Second Circuit affirmed the judgment of the District Court (R. 52).

The facts as disclosed by the record in the Hamburg-American Line case, No. 784, are substantially as follows (R. 3–27):

The petitioner Hamburg-American Line, a foreign corporation, was the owner of the S. S. *Milwaukee* (R. 3), which vessel arrived at the Port of New York on or about April 15, 1930 (R. 4), having on board alien seamen. On April 15, 1930, a United States immigration officer boarded the vessel, inspected the crew, and it not having been established to his satisfaction that one alien member of the crew had no intention of abandoning his calling as a seaman, served on the first officer an order to detain this seaman on board (R. 4, 17–18).

This alien seaman escaped from the vessel, illegally entered the United States, and was not on board the vessel when it sailed on April 19, 1930 (R. 15). On April 25, 1930, the Hamburg-American Line, petitioner here, was served with notice of liability to fine in the amount of $1,000 under the provisions of Sections 19 and 20 of the Immigration Act of 1924 (R. 19–20). The petitioner thereupon appeared by its attorney (R. 21) and objected to the imposition of the fine (R. 22–23). On October 10, 1930, this case came before the Board of Review in fine proceedings (R. 23). On February 13, 1931, it was recommended that a fine of $1,000 be imposed, and it was so ordered by the Secretary of Labor (R. 26–27). The petitioner, in order to obtain clearance of the vessel, paid to the respondent under protest the sum of $1,000 (R. 5). Thereafter the petitioner brought suit in the District Court for the Southern District of New York to recover the fine imposed (R. 3–6). The case was submitted to the court upon the pleadings and one exhibit. Both sides moved for a directed verdict. The court directed a verdict for the respondent (R. 12), and judgment was entered dismissing the complaint on the merits (R. 10). On appeal, the Circuit Court of Appeals for the Second Circuit affirmed the judgment of the District Court (R. 37).

ARGUMENT

The cases of the two petitioners involve the same question of law and substantially similar facts.

They were considered together by the court below in one opinion which affirmed the judgments of the District Court.

It is admitted by the petitioners that they brought to the port of New York three alien seamen who were ordered detained on board by the inspecting immigration officers, that these three seamen escaped and did not sail with their vessels, and so far as the record discloses are still illegally in the United States.

The petitioners, however, contend that the fines were unlawfully imposed, because the notices to detain on board were not served upon the owners, charterers, consignees, or masters of the vessels, the persons designated in the statute as those upon whom the obligation to detain on board rested. While the record discloses that the orders to detain on board were served upon officers of the vessels other than the masters thereof, we submit that, in the circumstances existing in these cases, there was compliance with the statute sufficient to justify the imposition of the fines.

In the case of the Compagnie Generale Transatlantique, the immigration inspector served the order of detention upon the fourth officer of the vessel, and also upon a person designated as "commander" who may well have been the master of the vessel. In the Hamburg-American Line case, the immigration inspector served the order of detention upon the first officer of the vessel and it

would appear that the master of the vessel had actual notice of the order to detain before the seamen escaped (R. 4, 16–17).

While the record is silent as to whether or not the officers actually served were in charge of the vessel at the time service was made, it may well be presumed, as was indicated by the District Court (No. 783, R. 22–23), that the persons served were the acting masters of the vessels, as otherwise the petitioners would have presented evidence to the contrary. The law is well settled that there is a presumption of regularity which attaches to the acts of public officials. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14; *Smith* v. *St. L. & So. W. Ry. Co.,* 181 U. S. 248, 258; *Quinlan* v. *Green County,* 205 U. S. 410, 422. The obligation rested on the petitioners to present convincing evidence that the immigration inspector had not served the officers in charge of the vessels. *Smith* v. *St. L. & So. W. Ry. Co., supra.* In the light of the fact that no evidence whatsoever was introduced to show that the masters of the vessels were on board and in charge of the vessels, we submit that the court below was correct in concluding as a matter of fact that the officers served were actually in charge of the vessels.

While the statute provides that the notice to detain shall be served upon the master of the vessel, it must be interpreted in a manner which will not do violence to the purpose of the Act. If the contention of the petitioners be correct, it would be

impossible, should the master go ashore, secrete himself, or otherwise make himself immune to service, properly to enforce the immigration laws. The requirement that service be made upon the master is primarily for the purpose of procuring the detention of the aliens. Unless the officer who is the acting master during the master's absence may lawfully be served, alien seamen might be allowed to land illegally, and no one would be chargeable with the duty of detaining them on board.

The petitioners also contend that they are not liable to fine unless the notices to detain on board and the notices of liability to fine were served personally on them. The notice of hearing in the first case was served on the French Line, owner of the S. S. *Ile de France* (R. 4, 32), and notice in the second case was served on the Hamburg-American Line, owner of the S. S. *Milwaukee* (R. 3, 19). While the notices described the petitioners as agents, such description is immaterial and does not alter their character as owners. These notices set forth that if a hearing was desired as to whether a fine should be imposed "you will be allowed sixty days from the date of this notice for that purpose, * * *." As the result of such notices, attorneys for the owners, the petitioners here, requested hearings and appeared before the Board of Review and opposed the imposition of the fines. It is apparent, therefore, that the owners of the vessels had notice of the hearings, and an opportunity to be heard. Due process of law requires no more.

The appearance and submission of the petitioners to the jurisdiction of the Secretary of Labor corrected any defect in respect of service which might have existed.

No question here exists as to the sufficiency of the service of notices of liability to fine inasmuch as the notices were actually served upon the owners. Notice to the master to detain on board has been held in effect the equivalent of notice to the owner, thereby imposing a duty to detain on the owner. *British Empire Steam Navigation Co., Ltd.* v. *Elting,* 74 F. (2d) 204 (C. C. A. 2d)[1]; *Societe Ligure Di Aramento* v. *Elting,* 74 F. (2d) 207 (C. C. A. 2d).

The decision below does not conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Sinclair Navigation Company* v. *United States,* 32 F. (2d) 90. In that case no notice had been served on the master to detain the alien on board the vessel, and the court held that the imposition of a fine for violation of the immigration laws by reason of the failure to detain an alien seaman on board a vessel was illegal where, in fact, no order to detain had been made.

The case at bar may likewise be distinguished from *Lancashire Shipping Company, Ltd.* v. *Elting,* 70 F. (2d) 699 (C. C. A. 2d). In the *Lancashire* case the notice of detention was served on the

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[1] This case is now pending before this Court on a petition for a writ of certiorari to which the Government has filed a brief in opposition (No. 761).

master of the vessel, and notice of liability to fine was served on the agent of the owner. The owner, however, never participated in the hearing, nor was it a party to the proceedings; whereas, in the instant case, the owners were served with notices of liability to fine, participated in the hearings, opposed the imposition of the fines, and were parties to the proceedings.

The other decisions of the Circuit Court of Appeals for the Second Circuit cited by the petitioners are so obviously inapplicable that they do not require discussion.

CONCLUSION

We respectfully submit that the decision of the court below is correct, and that the petition for writs of certiorari should be denied.

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GEORGE C. SWEENEY,
Assistant Attorney General.
M. LEO LOONEY, JR.,
PAUL A. SWEENEY,
Attorneys.

APRIL 1935.

APPENDIX

The Immigration Act of 1924, c. 190, 43 Stat. 153, 164 (U. S. C., Title 8, Secs. 166, 167), provides in part as follows:

> SEC. 19. No alien seaman excluded from admission into the United States under the immigration laws and employed on board any vessel arriving in the United States from any place outside thereof, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to such regulations as the Secretary of Labor may prescribe for the ultimate departure, removal, or deportation of such alien from the United States.
>
> SEC. 20. (a) The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clear-

ance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(b) Proof that an alien seaman did not appear upon the outgoing manifest of the vessel on which he arrived in the United States from any place outside thereof, or that he was reported by the master of such vessel as a deserter, shall be prima facie evidence of a failure to detain or deport after requirement by the immigration officer or the Secretary of Labor.

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v.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 6

COMPAGNIE GENERALE TRANSATLANTIQUE,
petitioner

v.

PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK

No. 7

HAMBURG-AMERICAN LINE,
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PHILIP ELTING, COLLECTOR OF CUSTOMS, PORT OF NEW YORK

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The oral opinions of the District Court are not reported (No. 6, R. 12–16; No. 7, R. 7). The opinion of the Circuit Court of Appeals for the Second Circuit (No. 6, R. 31–32; No. 7, R. 21–23) is reported in 74 F. (2d) 209.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered December 17, 1934 (No. 6, R. 33; No. 7, R. 23). The petition for writs of certiorari was filed March 15, 1935, and was granted April 29, 1935 (No. 6, R. 35; No. 7, R. 25). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether service on the Commander and the Fourth Officer of the S. S. *Ile de France* and the Chief Officer of the S. S. *Milwaukee* of notices to detain alien seamen on board, addressed to the owners of the vessels, among others, was sufficient compliance with Section 20 (a) of the Immigration Act of 1924 and Rule 7, Subdivision H, paragraph 2, of the Immigration Rules of January 1, 1930, to charge the owners of these vessels with liability to fine for failure to detain alien seamen on board as required by the immigration officers.

2. Whether service on the owners of these vessels, the petitioners here, of notices of liability to fine, which described the owners as agents, was sufficient compliance with Section 20 (a) of the Immigration Act of 1924 and with Rule 7, Subdivision H, paragraph 2, and Rule 23, Subdivision B, of the Immigration Rules of January 1, 1930, the owners having acknowledged service of the notices, appeared before the Board of Review and opposed the imposition of the fines.

STATUTE AND REGULATIONS INVOLVED

The applicable portions of the statute and regulations involved are set forth in the Appendix, *infra,* pp. 28–32.

STATEMENT

The facts as disclosed by the record in the Compagnie Generale Transatlantique case (No. 6, R. 2–28) may be summarized as follows:

Compagnie Generale Transatlantique, a foreign corporation, is the owner and operator of the SS *Ile de France* (R. 2), which vessel arrived at the port of New York on or about February 6, 1930, having on board alien seamen (R. 3). A United States immigration officer thereupon boarded the vessel and inspected the crew (R. 3). It not having been established to his satisfaction that 102 alien members of the crew had no intention of abandoning their calling as seamen, and it appearing that they were not on the visa crew list (R. 18), the immigration officer issued a notice directing the owner, among others, to detain such alien seamen on board (R. 17), and served it on the Commander,[1] and also upon the Fourth Officer of the vessel (R. 18). Two of these alien seamen, whose detention on board had been ordered, escaped from the vessel

[1] The complaint filed in the District Court alleged: "5. * * *; that on the vessel's arrival it was boarded by *a representative of the United States Immigration Service who directed the master to detain this seaman* and 101 other members of the crew * * *." (No. 6, R. 3.) (Italics supplied.)

(R. 3–5), illegally entered the United States, and were not on board the vessel when it sailed on February 7, 1930 (R. 21).

The French Line,[2] owner of the vessel (R. 2), was accordingly served with notice of liability to fine in the amount of $2,000 under the provisions of Sections 19 and 20 of the Immigration Act of 1924. In this notice, the French Line (the petitioner) was addressed as the agent of the vessel (R. 21–22). Thereupon it appeared by its attorney (R. 22–23) and objected to the imposition of the fine for reasons assigned in its protest (R. 24–26).

On May 17, 1930, this case came before the Board of Review in fine proceedings (R. 26). Pursuant to the recommendation of that Board, a fine of $2,000 was imposed (R. 26–27). The petitioner, in order to obtain clearance of the vessel, paid to the respondent, under protest, the sum of $2,000 (R. 4, 6).

Thereafter, the petitioner brought suit in the District Court of the United States for the Southern District of New York to recover the fine imposed (R. 2). The case was submitted to the court upon the pleadings and one exhibit, the Department of Labor file (R. 10–12), and both sides moved for a directed verdict (R. 16). The court directed a verdict for the respondent (R. 16), and judgment was

[2] Counsel for this petitioner stated in the District Court that the French Line was the plaintiff (petitioner) in this action (No. 6, R. 12).

entered dismissing the complaint on the merits (R. 9–10). On appeal, the Circuit Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court (R. 33).

The facts as disclosed by the record in the Hamburg American Line case (No. 7 R. 2–17) are substantially as follows:

The petitioner, Hamburg-American Line, a foreign corporation, is the owner and operator of the S. S. *Milwaukee* (R. 2), which vessel arrived at the port of New York on or about April 15, 1930, having on board alien seamen (R. 2). A United States immigration officer thereupon boarded the vessel and inspected the crew (R. 3). It not having been established to his satisfaction that one alien member of the crew had no intention of abandoning his calling as a seaman, the immigration officer issued a notice directing the owner, among others, to detain that seaman on board, and served it on the Chief Officer of the vessel (R. 2, 3, 11). In compliance with such notice, the master detained the seaman on board the vessel until "the said seaman subsequently left the vessel" or escaped (R. 3, 9–10). On April 19, 1930, the master of the S. S. *Milwaukee* stated that upon the order of the Hamburg-American Line the alien seaman had been kept on board, and that a watchman of the Hamburg-American Line pier police was detailed to hold him in custody. The alien was locked up in the isolation hospital, a watchman posted in front of the door, and the keys

given into his hands. Around two o'clock in the morning, the quartermaster reported to the third mate that the alien had escaped, and an immediate search revealed the fact that although the watchman was at his post in front of the locked door, the hospital was empty (R. 9–10). The alien seaman, whose detention on board had been ordered, was not on board the vessel when it sailed on April 19, 1930 (R. 9).

The Hamburg-American Line, owner of the vessel (R. 2), was accordingly served with notice of liability to fine in the amount of $1,000 under the provisions of Sections 19 and 20 of the Immigration Act of 1924. In this notice, the Hamburg-American Line (the petitioner) was addressed as the agent of the vessel (R. 11–12). Thereupon it appeared by its attorney and objected to the imposition of the fine (R. 12–14) on the sole ground that notice to detain had been served on the Chief Officer but not on the Master.

On October 10, 1930, this case came before the Board of Review in fine proceedings (R. 14–15). On February 13, 1931, pursuant to the recommendation of that Board, a fine of $1,000 was imposed (R. 16–17). The petitioner, in order to obtain clearance of the vessel, paid to the respondent, under protest, the sum of $1,000 (R. 3).

Thereafter, the petitioner brought suit in the District Court of the United States for the Southern District of New York to recover the fine im-

posed (R. 2–4). The case was submitted to the court upon the pleadings and one exhibit, the Department of Labor file, and both parties moved for a directed verdict (R. 7). The court directed a verdict for the respondent (R. 7), and judgment was entered dismissing the complaint on the merits (R. 5–6). On appeal, the Circuit Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court (R. 23).

SUMMARY OF ARGUMENT

1. The statute imposes an obligation on the owner of any vessel arriving in the United States from a place outside thereof to detain alien seamen on board until they have been inspected and to continue this detention after inspection if required to do so by the immigration officer. The statute employes the word "required", which, of course, means that in some manner the order of detention must be brought home to the party to be charged. The immigration rules alone, however, determine the form of notice and the manner of service. The petitioners brought to the Port of New York three alien seamen who were ordered detained but who subsequently escaped and did not sail with their vessels. In the case of Compagnie Generale Transatlantique, service of the notice to detain was made on the Commander of the vessel, as well as on the Fourth Officer. In the Hamburg-American

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Line case service was made on the Chief Officer of the vessel. In the Compagnie Generale Transatlantique case, the complaint filed by the petitioner in the court below stated that the notice to detain was served on the master of the vessel (R. 3, 5), but in any event, there was no evidence that service was not made in the case of each vessel upon the acting master thereof. No evidence having been presented by the petitioners that the service was not made upon the acting masters, and in view of the presumption of regularity which attaches to the acts of public officials, the court below was correct in concluding, as a matter of fact, that the officers served were actually in charge of the vessels. The master of a vessel is the agent of the owner. Service on the master of a vessel of a notice to detain alien seamen on board is sufficient to charge the owner with liability for failure to detain such alien seamen on board as required. The notices to detain on board were directed to the owners and were served on the masters or acting masters of the vessels. The record does not disclose, what, if any, steps were taken to detain the seamen in the Compagnie Generale Transatlantique case, but it appears in the Hamburg-American Line case that the notice was brought home to the owner and its pier police were employed to detain the alien on board. In these circumstances, we submit that service of a notice to detain alien seamen, addressed to the owner of the vessel and

served upon the master or the acting master, is sufficient compliance with the statute and immigration rules.

2. The petitioners further contend that the fines were unlawfully imposed for the reason that they were not served with notices of liability to fine. The statute does not contain any requirement for service of such notice, but the immigration rules contemplate that if the owner is to be held for the fines he shall be so notified. Notices of liability to fine were served on the petitioners, but they were described in the notices as agents, and not owners. Each of the petitioners actually acknowledged service of the notice, appeared and objected to the imposition of the fines, and were parties to the proceedings. If the petitioners were required to detain the alien seamen on board, they are not entitled to recover the fines imposed because of subsequent irregularities which did not involve the denial of due process.

The instant suits are against the respondent individually for money had and received, and are equitable in their nature. The petitioners, therefore, should not be entitled to recover unless equity and good conscience call for the return of the money. The petitioners violated the duty imposed on them by the statute, became subject to fines, and are not entitled in equity and good conscience to recover.

3. The cases relied on by the petitioners are not contrary to the decisions below.

ARGUMENT

I

SERVICE ON THE COMMANDER AND THE FOURTH OFFICER OF THE SS ILE DE FRANCE AND ON THE CHIEF OFFICER OF THE SS MILWAUKEE OF NOTICES DIRECTING THE OWNERS OF THESE VESSELS TO DETAIN ALIEN SEAMEN ON BOARD CONSTITUTED A SUFFICIENT COMPLIANCE WITH THE STATUTE AND IMMIGRATION RULES TO CHARGE THE OWNERS OF THESE VESSELS WITH LIABILITY TO FINE FOR FAILURE TO DETAIN AS REQUIRED

Section 20 of the Immigration Act of 1924, *infra*, p. 28, imposes an obligation on the owner, charterer, agent, consignee, or master of any vessel arriving in the United States from a place outside thereof, to detain on board all alien seamen employed on the vessel until the immigration officer has inspected such seamen, and to continue the detention of alien seamen after inspection, if required so to do by such immigration officer. This section further provides for the imposition of a fine of $1,000 for each alien seaman with respect to whom this obligation is not observed.

Section 20 finds its origin in Section 32 of the Immigration Act of 1917, c. 29, 39 Stat. 874, 895, which it expressly repealed. Section 32 of the 1917 Act imposed liability only for "negligent failure" to detain, and made a notice in writing to detain " by the immigration officer in charge at the port of arrival" a condition precedent to liability to fine. This section was found inadequate to prevent the

illegal entry into this country of aliens under the guise of seamen.[3] The entire purpose of Section 20 was to provide more effective means to combat such illegal entry. *United States* v. *J. H. Winchester & Co.*, 40 F. (2d) 472, 473 (C. C. A. 2d). The question of negligence and the requirement of "notice in writing" as a condition precedent to liability to the penalty was eliminated. The statute places upon the persons named therein an absolute duty to detain all seamen on board prior to their inspection by the immigration authorities, and con-

[3] Extracts from report of Commissioner General of Immigration to Secretary of Labor contained in the appendix to the annual report of the Secretary of Labor for the fiscal year ended June 30, 1933 (p. 58):

> Seamen: * * * In the past fiscal year, 21,821 vessels were boarded upon arrival from foreign ports, * * * and 822,813 alien seamen underwent immigration examination. Three thousand and seventy were ordered held aboard * * * and 558 were removed to hospitals for treatment. * * * In addition to the alien seamen, 348,996 American citizens were found employed on vessels arriving from foreign ports (mostly American bottoms), but all had to be questioned sufficiently to determine their nationality. In the past, oftentimes as many as half of the crew of vessels of certain flags, passed as bona fide seamen, would desert in port, and when the vessel came to sail the master would sign on none or very few others to replace them, a plain indication that the crew was excessive upon arrival, and a moral certainty that aliens had been signed on for a consideration and with foreknowledge that illegal entry into the United States was planned. This is one of the many "rackets" to circumvent the immigration laws, * * *.

tinues this duty, after inspection, as to such alien seamen as are required to be detained by the immigration authorities.

We think it clear that the effect of the second clause in Section 20 is to release the owner, after inspection of the crew, from the duty of detaining all the alien seamen, but continues the original obligation as to such seamen as are ordered detained by the immigration officer. The statute employs the word "required" in respect of the continued detention. Of course, this means that in some manner the order of detention must be brought home to the party sought to be charged, but the form of such notice and the manner of its service are left entirely to the Secretary of Labor and the Commissioner General of Immigration. Statements by the petitioner to the effect that the statute requires written notice and service thereof in any particular manner are clearly erroneous. It is the immigration rules alone that determine the form of notice and the manner of service.

It is admitted by the petitioners that they are the owners and operators of the vessels which brought to the port of New York three alien seamen, and that these seamen were ordered detained on board after inspection by the immigration officers (No. 6, R. 3, 5; No. 7, R. 2–3). It is also admitted that these three alien seamen escaped, and did not sail with the vessels, and, so far as the

record discloses, are still illegally in the United States (No. 6, R. 3, 5; No. 7, R. 3, 9). In these circumstances, the court below held, correctly we submit, that the petitioners had violated the statute and that the fines were properly imposed for such violations. The petitioners contend, however, that the fines were unlawfully imposed because the notices issued by the immigration officers directing the owners to detain the alien seamen on board the vessels were actually served neither on the masters of the vessels nor on the owners.

In the case of Compagnie Generale Transatlantique, service was made on the Commander of the vessel as well as upon the Fourth Officer. There is no evidence in the record that the Commander of the S. S. *Ile de France* was not the master of the vessel. In its complaint filed in the District Court, the petitioner stated that the master was directed to detain the aliens on board (No. 6, R. 3, 5). In a protest filed with the Board of Review in the fine proceedings, counsel for the petitioner did not even suggest that service was not made upon the master of the vessel. The only place in the record where it is even intimated that the person served was not the master of the vessel is in the statement to that effect made by counsel for the petitioner at the trial, who asserted, without any evidence in support thereof, that service was not made upon the master of the vessel (No. 6, R. 11). In respect of the *Ile de France*, therefore, we submit that, the

petitioner having averred that service was made on the master, and that fact having been admitted in the answer of the respondent (R. 8), it must be conclusively presumed that the Commander was in fact the master of the vessel, and that service was, therefore, made upon the master. But even if the Commander were not actually the master of the vessel, there was no evidence introduced by the petitioner to show that the master was actually on the vessel at the time that the notice to detain was served and that either the Commander or the Fourth Officer was not then actually in charge of the vessel.

This was also the situation in the Hamburg-American Line case in which the notice to detain was served on the Chief Officer of the vessel. The petitioners assert, however, that a person in charge of a vessel in the absence of the master cannot be regarded as the "master" within the meaning of the statute and the immigration rules for the purpose of serving the notice to detain. This contention, we submit, is without merit.

During the absence of the master, the person in charge of a vessel is obviously the acting master, at least so far as the control of the crew is concerned. In the instant cases there is no evidence in the record that the officers served were not in charge of the vessels at the time service was made, or that the masters were actually on board and in charge at such time. It was the duty of the immigration officers to serve the officers who were in charge

of the vessels. The law is well settled that there is a presumption of regularity attaching to the acts of public officials. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14; *Quinlan* v. *Green County,* 205 U. S. 410, 422; *Smith* v. *St. L. & S. W. Ry.,* 181 U. S. 248, 258. If service were made upon a person other than the officer in charge, the burden rested upon the petitioners to present convincing evidence to this effect in order to rebut the presumption of regularity which attaches to the acts of public officials. *Smith* v. *St. L. & S. W. Ry., supra.* All questions of fact and inferences of fact, insofar as supported by substantial evidence, were concluded in favor of the respondent by the findings of the trial court, both parties having moved for a directed verdict. *Williams* v. *Vreeland,* 250 U. S. 295; *Fidelity & Casualty Company of New York* v. *Martin,* 66 F. (2d) 438 (C. C. A. 9th). In the light of the fact that no evidence whatsoever was introduced to show that the masters of the vessels were on board and in charge of the vessels at the time of service of the notices to detain, we submit that the court below was correct in drawing the inference and concluding as a matter of fact that the officers served were actually in charge of the vessels.

That such service sufficiently complies with the statute and the regulations would seem obvious. When a vessel arrives in port, it is, of course, not unusual for the master to go ashore in order to

file the necessary documents or to make required reports to the Collector of Customs. If service of a detention order may not be made upon the officer in charge of the vessel in the absence of the master, enforcement of the Act would be rendered almost impossible. The immigration rules must, of course, be interpreted in a manner which will not do violence to the purpose of the Act. If the contention of the petitioners be correct, it would be impossible, should the master go ashore, secret himself, or otherwise make himself immune to service, properly to enforce the statute.

The requirement that service be made upon the master of the vessel is primarily for the purpose of procuring the detention of the aliens. Unless the officer who is the acting master during the master's absence may lawfully be served, alien seamen might be allowed to land illegally and no one would be chargeable with the duty of detaining them on board. We think it clear, therefore, in the circumstances disclosed in these cases, that the service effected conformed both with the requirements of the statute and with the applicable rule. Moreover, the protest of the attorney for the French Line made no contrary contention in this regard (R. 25), but was put on different ground.

It may further be pointed out that while in the Hamburg-American Line case service of the notice to detain was not actually made upon the master,

it appears from the record that he submitted a report on the escape of the alien seaman involved (R. 9–10), which discloses, as was said by the Circuit Court of Appeals (R. 22), that "he had notice of the order (to detain) long before the alien escaped, and that he acted upon it." This is also supported by the complaint of the petitioner in the District Court in which it stated "that in pursuance of said notice (the notice to detain) the Master of the said S. S. *Milwaukee* did detain the seaman, Abraham Silber, on board the said vessel but in some unknown manner the said seaman subsequently left the vessel" (R. 3).

It is evident that the master felt that he and the owner of his ship were bound by the notice which had been served upon the Chief Officer of the vessel.

The question which is then presented is, whether service of the notice to detain upon the master or acting master of the vessel is sufficient to bind the owner of the vessel when the notice to detain is directed to the owner, as well as the other persons upon whom the duty to detain on board is placed by the statute.

The master of the vessel is the agent of the owner. *American Asiatic Co.* v. *Robert Dollar Co.*, 282 Fed. 743, 749 (C. C. A. 9th); *The Penza*, 9 F. (2d) 527 (C. C. A. 2d); cf. *Suzuki* v. *National Surety Company*, 290 Fed. 942 (C. C. A. 2d). It has been held that service on the master of a notice

to detain alien seamen on board is sufficient to charge the owner with liability for failure to detain such alien seamen on board as required. *British Empire Steam Navigation Co.* v. *Elting,* 74 F. (2d) 204 (C. C. A. 2d), certiorari denied October Term, 1934, No. 761; *United States* v. *J. H. Winchester & Co., Inc.,* 40 F. (2d) 472 (C. C. A. 2d); *United States* v. *Columbus Marine Corp.,* 62 F. (2d) 795 (C. C. A. 2d).

It is obvious that a corporation, which owns a vessel, can only be served with notice to detain on board through the medium of an agent, and if such notice is to be effective, such agent must be on board the vessel. The master is the agent of the owner for all purposes. *The Woodland,* 104 U. S. 180; *The J. P. Donaldson,* 167 U. S. 599.[4] In these circumstances, it would seem clear that the master of the vessel, or, in his absence, the acting master, at least so far as the crew is concerned, is a person through whom service upon the owner may be made.

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[4] Section 37 of the Immigration Act of 1917, c. 29, 39 Stat. 874, 897 (U. S. C., Title 8, Sec. 173), reads in part as follows:

> * * * When construing and enforcing the provisions of this Act, the act, omission, or failure of any director, officer, agent, or employee of any corporation, company, or association acting within the scope of his employment or office shall in every case be deemed to be the act, omission, or failure of such corporation, company, or association, as well as that of the person acting for or in behalf of such corporation, company, or association.

The notices to detain on board in the instant cases were directed to the owners, as well as the other parties charged by the statute with the duty to detain on board. The notice served upon the master of the vessel, while binding upon him individually, inasmuch as he is one of the persons named in the statute, also is binding upon the owner for whom he is the agent. While it does not appear what steps, if any, were taken to detain the seaman in the Compagnie Generale Transatlantique case, it affirmatively appears in the Hamburg-American Line case that the notice was brought home to the owner and that its pier police were employed to detain the alien on board (R. 10).

The obvious intention of the Act would seem to be, in the final analysis, to make the owner, through the medium of the vessel, the guarantor of the payment of any fine irrespective of whom it may be levied against, because the statute provides that if an order to detain on board has been served and such order is not complied with, the vessel shall not be granted clearance pending the determination of the liability to the payment of such fine, or while the fines remain unpaid, unless there be deposited a sum sufficient to cover such fine or a bond with sufficient surety to secure the payment thereof.

We submit, therefore, that service of a notice to detain on board alien seamen when addressed to the owner of a vessel and served either upon the master or the acting master thereof is sufficient to

place the obligation upon such owner to detain the specified aliens on board the vessel, and that a failure to detain such seamen on board subjects the owner to the imposition of the penalty.

II

ACTUAL SERVICE ON THE OWNERS OF THE VESSELS OF NOTICES OF LIABILITY TO FINES AND THEIR SUBSEQUENT APPEARANCE AND OBJECTION TO THE IMPOSITION OF THE FINES IS SUFFICIENT COMPLIANCE WITH THE STATUTE AND THE IMMIGRATION RULES

It is also contended by the petitioners that these fines were unlawfully imposed for the reason that they (the owners of the vessels) were not served with notices of liability to fine. The statute does not contain any requirement for service of such notice, but Rule 23, Subdivision B, paragraph 1, of the Immigration Rules of January 1, 1930, *infra*, pp. 30–31, undoubtedly contemplates that if the owner of the vessel is to be held for the fines, notice of liability therefor shall be served upon him, and that he shall be allowed a period of sixty days within which to submit evidence and be heard. See also Rule 7, Subdivision H, paragraph 2, *infra*, pp. 29–30.

In the case of Compagnie Generale Transatlantique, the notice of liability to fine was directed to the French Line as agent of the S. S. *Ile de France* (R. 21). In the Hamburg-American Line case, the notice of liability to fine was directed to the Hamburg-American Line as the agent of the S. S.

Milwaukee (R. 11). The fact that these notices described the owners as the agents of the vessels did not affect the validity of the notices.

The Compagnie Generale Transatlantique, one of the petitioners here, is the owner of the S. S. *Ile de France*. While it is contended by this petitioner that no service was made upon it, the record refutes this contention. We do not understand the petitioner to contend that it and the French Line are not identical, but only that a notice addressed to the owner, in which it is described as agent of the vessel, is not actually notice to the owner of the vessel. This petitioner on March 6, 1930, acknowledged service of the notice of liability to fine, requested that the papers be forwarded to the Department of Labor in Washington, and stated that its attorney would appear and present suitable defense (R. 23). At the trial of the case in the District Court, counsel for this petitioner admitted in his oral argument that the petitioner was served with notice.[5] It was also admitted by the

[5] Mr. O'Donnell. The first notice that the French Line received—they are the plaintiffs in this action—was a notice dated February 19, 1930, 13 days after the arrival of the vessel. The notice reads "To the French Line"——

The Court. Wait a minute. That is an additional notice from the one you have been telling me about?

Mr. O'Donnell. Yes; that is the first notice the company received.

The Court. The first notice served on the company itself?

Mr. O'Donnell. On the company itself. Addressed to the French Line, Agent of the vessel "Ile de France", 19 State

petitioner in its complaint filed in the District Court that it had been notified that a fine would be imposed,[6] and that it had duly filed a protest and submitted evidence to show why a fine should not be imposed (R. 3, 6).

The Hamburg-American Line, the other petitioner, is the owner of the S. S. *Milwaukee*. This petitioner, on August 12, 1930, acknowledged service of the notice of liability to fine, requested that the papers be forwarded to the Department of Labor in Washington, and stated that its attorney would appear and present suitable defense (R. 12–13). The Hamburg-American Line in its complaint filed in the District Court admitted that it had received notice of liability to fine.[7]

The fact that both of these petitioners actually acknowledged service of the notices of liability to

---

Street, New York City. *It is a notice of intention to impose a $2,000 fine*, not a notice to detain on board. * * *

In response to *the notice of intention to impose a fine*, the company through myself as their attorney, submitted a defense, * * * (No. 6, R. 12.) (Italics supplied.)

[6] 5. * * * That subsequently *the plaintiff was advised by the Commissioner of Immigration at the Port of New York that the ascertained facts indicated that a fine of $1,000.00 should be imposed. The notice* further stated that the plaintiff would be allowed a certain period of time within which to submit evidence to show that such fine should not be imposed. (No. 6, R. 5.) (Italics supplied.)

[7] 8. That thereafter, notwithstanding that the alien was coming to the United States solely in pursuit of his calling as a seaman, *the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed.* (No. 7, R. 3.) (Italics supplied.)

fine, and appeared and objected to the imposition of such fines, is sufficient evidence that the service was made upon the owners of the notices of liability to fine, and that their defenses were presented as a result of such notices. In administrative proceedings of this nature, all that the law requires is that the owner shall have an opportunity to be heard. *Lloyd Sabaudo Societa* v. *Elting,* 287 U. S. 329, 336. In the instant cases, the owners were served with notice of liability to fine, they participated in the hearings to determine whether fines should be imposed, and in all respects were parties to the proceedings. We submit, therefore, that due process was afforded these petitioners and their appearance and submission to the jurisdiction of the Secretary of Labor corrected any defect in the notices, if there were any such defect. *British Empire Steam Navigation Co.* v. *Elting, supra.*

If, as we have hereofore pointed out, the petitioners received such notice as "required" them to detain the alien seamen involved on board the vessels, they clearly are not entitled to recover the fines imposed because of subsequent irregularities which did not involve the denial of due process. They should not therefore be permitted to take advantage of mere technical defects in the form of the notice of liability served upon them or permitted to recover because the Secretary of Labor may have given some erroneous reasons for denying the petitioners' protest against the imposition of the fines.

The instant suits are against the respondent individually for money had and received. *Cosulich Line of Trieste* v. *Elting,* 40 F. (2d) 220 (C. C. A. 2d). Suit against collectors of customs and collectors of internal revenue to recover money paid under protest and duress are of this nature. *Elliott* v. *Swartwout,* 10 Pet. 137; *Bailey* v. *Railroad Co.,* 22 Wall. 604, 638, 639; *Sage* v. *United States,* 250 U. S. 33, 37; *Thomaston Cotton Mills* v. *Rose,* 62 F. (2d) 982 (C. C. A. 5th). These actions being for money had and received are equitable in their character. The petitioners are not entitled to recover unless equity and good conscience call for the return of the money. In the present cases, the petitioners violated the duty imposed upon them by Section 20 (a), and therefore became subject to fines which they are not entitled in equity and good conscience to recover. *Lewis* v. *Reynolds,* 284 U. S. 281; *Crompton & Knowles Loom Works* v. *White,* 65 F. (2d) 132, 133 (C. C. A. 1st); *Thomaston Cotton Mills* v. *Rose, supra; Champ Spring Co.* v. *United States,* 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852.

III

THE CASES CITED BY THE PETITIONERS ARE NOT CONTRARY TO THE DECISIONS BELOW

The decision in *Sinclair Navigation Co.* v. *United States,* 32 F. (2d) 90 (C. C. A. 5th), relied on by the petitioners, is based on an entirely different

state of facts. In that case an alien seaman was signed on as a member of the crew at New Orleans for a voyage to Tampico, Mexico, and return. When the vessel returned an immigration officer served an order on the master of the vessel to convey this alien to a hospital for treatment. During the night the alien disappeared from the vessel. A fine was imposed for failure to detain the alien seaman on board. No notice to detain the alien on board the vessel had been served, but only an order directing his removal to the hospital. The court held that the imposition of the fine was erroneous because the master had been directed to transport the alien to the hospital and not to detain the alien seaman on board the vessel.

There is no lack of harmony between the decisions in the instant cases and those of the court below upon which the petitioners rely. In *United States* v. *J. H. Winchester & Co., Inc.*, 40 F. (2d) 472 (C. C. A. 2d), a notice to detain on board was served on the master of the vessel, and notice of liability to fine was served on the local agent of the vessel's owner. The court held that notice to the master of the ship to detain alien seamen was not sufficient notice to the local agent of the vessel to impose the obligation upon such agent to detain the seamen, the master being the agent of the owner only, and that, in the absence of any obligation to detain on board, no liability to fine on the part of the agent arose. In the instant cases, the notices

to detain on board and the notices of liability to fine must be regarded, for the reasons heretofore stated, as having been served on the owners of the vessels. The owners, the petitioners here, appeared in the fine proceedings and opposed the imposition of the fines.

The case of *United States* v. *Columbus Marine Corp.*, 62 F. (2d) 795 (C. C. A. 2d), was decided upon the authority of the *Winchester* case, *supra*. This was also a case where the order to detain on board was served on the master of the vessel and the notice of liability to fine was served on the agent of the vessel. The finding of the court was to the effect that the master was not the agent of the local agent of the vessel, even though he was the agent of the owner, and therefore the local agent could not be held.

In the case of *Lancashire Shipping Co., Ltd.* v. *Elting*, 70 F. (2d) 699 (C. C. A. 2d), notice to detain on board was served on the master, and notice of liability to fine was served on the agent only. The fine was assessed against the agent, who was thereafter reimbursed by the owner. The owner did not appear in the fine proceedings. Upon a suit by the owner to recover the fine, the court held that both a detention order and notice of liability to fine must be served on the party to be charged, and that the fine had been improperly imposed for the reason that the notice to detain was served on the master of the vessel, while the notice of liability to fine

was served on the agent of the vessel's owner and not on the owner. However, in the instant case, the owners acknowledged receipt of the notices of liability, opposed the imposition of the fines, and were parties to the proceedings.

CONCLUSION

For the reasons stated above, we respectfully submit that the judgments of the Circuit Court of Appeals should be affirmed.

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OCTOBER 1935.

APPENDIX

The Immigration Act of 1924, c. 190, 43 Stat. 153, 164 (U. S. C., Title 8, Secs. 166, 167), provides in part as follows:

> SEC. 19. No alien seaman excluded from admission into the United States under the immigration laws and employed on board any vessel arriving in the United States from any place outside thereof, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to such regulations as the Secretary of Labor may prescribe for the ultimate departure, removal, or deportation of such alien from the United States.
>
> SEC. 20. (a) The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance

pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(b) Proof that an alien seaman did not appear upon the outgoing manifest of the vessel on which he arrived in the United States from any place outside thereof, or that he was reported by the master of such vessel as a deserter, shall be prima facie evidence of a failure to detain or deport after requirement by the immigration officer or the Secretary of Labor.

* * * * *

(d) Section 32 of the Immigration Act of 1917 is repealed, but shall remain in force as to all vessels, their owners, agents, consignees, and masters, and as to all seamen, arriving in the United States prior to the enactment of this Act.

IMMIGRATION RULES OF JANUARY 1, 1930

RULE 7. ALIEN SEAMEN

* * * * *

Subdivision H. Detention and Deportation of Seamen

PAR. 2. Where, for any cause, the immigration official in charge at any port of arrival finds that any alien employed on board any vessel arriving in the United States from any place outside thereof should be detained on such vessel or deported, he shall forthwith serve or cause to be served on the owner, charterer, agent, consignee, or

master of such vessel a notice in writing to detain or deport such alien, which notice shall set forth the full name of such alien, and in such case an officer of the Immigration Service shall be detailed to verify the departure of such alien; and when such owner, charterer, agent, consignee, or master fails, neglects, or refuses to detain or deport such alien as required, such immigration official in charge shall forthwith serve or cause to be served on such owner, charterer, agent, consignee, or master a notice in writing of the intention to impose the fine provided for by section 20 (a) of the Immigration Act of 1924 for each alien in respect of whom such failure, neglect, or refusal occurs.

RULE 23. IMPOSITION AND COLLECTION OF FINES

Subdivision B. Service of Notice.

PARAGRAPH 1. The officer in charge shall serve promptly upon the master, agent, owner, or consignee of the vessel, or other responsible person, a notice to the effect that the ascertained facts indicate that a fine should be imposed under the section of the law involved in the particular case; that he will be allowed 60 days from the date of service of the notice within which to submit evidence and be heard in reference to the matter; and that in the meantime the vessel involved, which is the subject of fine proceedings, will be granted clearance papers upon the condition that he deposit with the collector of customs, prior to the time of sailing, a sum equal to the fine specified in the said notice, such sum to be held as security for the payment of the fine in the event

it should be impcsed (or bond with sufficient surety approved by the collector of customs to secure payment thereof, where such is permitted by the act of May 26, 1924), and, in cases arising under section 9 of the act of February 5, 1917, as amended by the immigration act of 1924, or under section 16 of the immigration act of 1924, a sum equal to that paid by the alien involved for his transportation to this country from the initial point of departure, such latter sum to be held by the collector of customs as a special deposit and to be delivered to the deported alien through the American consul, if fine is imposed; and when such alien is accompanied by another alien who is excluded from admission a further sum equal to that paid by such accompanying alien for his transportation to this country from the initial point of departure, which likewise is to be held by the collector of customs and delivered to the accompanying alien when deportation is effected.

PAR. 2. Such notice shall be prepared in quadruplicate. The original shall be served on the master, agent, owner, or consignee of the vessel either by (a) delivering it to him in person, or (b) leaving it at his office, or, whenever the immigration officer in charge finds either of these methods of service inconvenient, (c) mailing it to him. When service is made by delivery it shall be admitted in writing upon the duplicate and triplicate and the admission witnessed by the server. If admission be refused, or in case of service by either of the other methods, the server shall note the method and date of service on the duplicate and triplicate. The duplicate shall be retained by the immigra-

tion officer in charge. The triplicate shall be delivered to the collector of customs for the district wherein the port of arrival is located, who shall withhold clearance papers until the deposit is made and the quadruplicate shall be forwarded to the bureau when the matter of fine is presented for departmental consideration.

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OCT 9 1935

Supreme Court of the United States

OCTOBER TERM, 1935.

COMPAGNIE GENERALE TRANSATLANTIQUE, *Petitioner,* *against* PHILIP ELTING, Collector of Customs, Port of New York.	No. 6
HAMBURG-AMERICAN LINE, *Petitioner,* *against* PHILIP ELTING, Collector of Customs, Port of New York.	No. 7

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS.

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Sec. 28, 8 U. S. C., s. 224(b) 14

Immigration Act of 1917.

Sec. 4, 8 U. S. C., s. 138 6
Sec. 5, 8 U. S. C., s. 139 6
Sec. 7, 8 U. S. C., s. 143 6
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Sec. 35, 8 U. S. C., s. 169 6
Sec. 36, 8 U. S. C., s. 171 6
Sec. 36, 8 U. S. C., s. 220 6

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28 U. S. C., s. 41-a 4
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32 Stats. 1217 5
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Supreme Court of the United States

OCTOBER TERM, 1935.

COMPAGNIE GENERALE TRANSATLANTIQUE, Petitioner, *against* PHILIP ELTING, Collector of Customs, Port of New York.	No. 6
HAMBURG-AMERICAN LINE, Petitioner, *against* PHILIP ELTING, Collector of Customs, Port of New York.	No. 7

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS.

This brief is submitted, by leave of the Court, in behalf of Rio Cape Line Ltd. and other steamship owners who have cases similar to these cases pending in the Circuit Court of Appeals for the Second Circuit and in other Federal Courts and who consider that they have suffered unnecessary losses, as well as much inconvenience, owing to the method adopted by Immigration Officials in administering the Statute which is brought before the Court by the petitioners for interpretation (8 U. S. C. s 167).

The practice disclosed by the records in these cases was early condemned by Judge HOUGH in the case of *Chin Loy* v. *Curran,* 1923 A. M. C. 1145, in which he said:

> "This business of making a jail out of a ship, another man's ship, and thereby saving a little money on the appropriation, I do not think is legal, and I know perfectly well that it is mean. It is not decent. What earthly right has the United States to make a jail out of the *Vechtdijk?* Really, you know it is one of those things that seem to me to bring executive administration into contempt. I will not be of any assistance to them."

Since that time, however, the lower federal courts have interfered but little with the Departmental practice under this Statute.

The Departmental practice permits a boarding inspector to determine finally on primary inspection whether an alien seaman is entitled to shore leave. No record is made or kept of the nature or scope of the inspection, but a detention order issued on the basis of such an inspection, however cursory, even though it may require the detention of the entire alien crew, is held to be binding upon the master and owner and upon the agent, if served upon him. No means of review of the detention order is provided by the Statute as interpreted by the Labor Department. The duty to detain is held to be absolute, and the escape of any seaman so ordered detained is held to fix absolute liability for penalties of $1,000 each, even though the highest degree of diligence has been observed. Neither the Courts nor the Secretary of Labor will give any adequate consideration to the fairness of the inspection or the validity of the detention notice. *British Empire Steam Navigation Co., Ltd.* v. *Elting,* 74 Fed. (2d) 204; *Societa Ligure Di Armamenti* v.

Elting, 74 Fed. (2d) 207. The result is that the mere *ipse dixit* of a boarding inspector often places upon the owner and master the burden of thousands of dollars in penalties as well as serious inconvenience in loading and discharging activities owing to the necessity of keeping the detained seamen on board the vessel in custody or under guard.

So far as the questions immediately presented by the petitioner are concerned, they have been so fully presented in the supporting brief, that little can be added. In our opinion the contentions there made are well founded. There are other questions presented by the record, however, which are of more far-reaching importance and which we believe are open for consideration on these records. *Lowe* v. *Lawler,* 208 U. S. 274.

These questions are as follows:

1. Does the Act contemplate the imposition of fines by the Secretary of Labor, or are they to be enforced by judicial proceedings in the first instance?

2. May a boarding inspector, as distinguished from a Commissioner of Immigration, acting through a Board of Special Inquiry, validly order the detention of alien seamen?

Allegations in the complaints, admitted by the answers, show that the fines were imposed by an assistant to the Secretary of Labor, and that the detention notices were issued by a boarding inspector, No. 6, ff. 4, 5, 6, 12, 13, 14, 41; No. 7, ff. 4, 5, 7, 8, 27.

FIRST POINT.

THE IMMIGRATION ACT CONTEMPLATES THAT THE LIABILITY FOR FINES UNDER SECTION 20 OF THE 1924 ACT SHOULD BE JUDICIALLY DETERMINED.

The Government did not institute any judicial proceedings for the determination of the liability of the petitioners to penalties. The Department of Labor, as an administrative matter, imposed the fines and payment was enforced by the refusal of the Collector of Customs to grant clearance to the petitioners' vessels until the fines were paid.

The liability for such a fine constitutes "a case" of which jurisdiction is given to the Courts of the United States by Article 3, Section 2 of the Constitution, and to the District Courts by the Judiciary Act (28 U. S. C. 41-1a), because it is one that arises under the laws of the United States and because it involves a penalty (28 U. S. C. 41-9). Also Section 25 of the Immigration Act of 1917 (8 U. S. C. 164), which is still in force and applies to both acts, provides in part:

> "That the District Courts of the United States are hereby invested with full jurisdiction of all causes, civil and criminal arising under any of the provisions of this Act * * *."

Since general jurisdiction of such matters has been given to the Courts by the laws and constitution of the United States, such Courts can be divested of that jurisdiction only by express enactment vesting the power in some other tribunal or officer. On that principle Attorney General Moody held that the determination of liability for

the penalties prescribed in Section 15 of the Act of March 3, 1903 (32 Stat. 1217, Sec. 15), was not an administrative function.

That Section was as follows:

> "Sec. 15. That in the case of the failure of the master or commanding officer of any vessel to deliver to the said immigration officers lists or manifests of all aliens on board thereof as required in sections twelve, thirteen, and fourteen of this Act, he shall pay to the collector of customs at the port of arrival the sum of ten dollars for each alien concerning whom the above information is not contained in any list as aforesaid."

It will be observed that the above section, like Section 20 of the 1924 Act, did not specify in terms who should determine liability for the fine. Both sections provide simply that upon violation the designated person "shall pay to the Collector of Customs" a certain sum of money. With respect to the manner in which liability should be determined, the Attorney General in part said:

> "Now it seems certain that this statute has not conferred upon the collector of customs the judicial power to hear and determine this matter, to adjudge the master guilty, and to impose the penalty prescribed. Thus to sit in judgment, to hear and determine, to adjudge a person guilty of a violation of a penal statute is a high judicial function which can never be exercised by an executive officer, unless it has been expressly conferred upon him by some law. Had Congress intended to confer this important judicial power upon the collector of customs, it is morally certain that it would have expressed such intention in language fairly susceptible of such mean-

> ing. As Congress has not done so, it is but fair to conclude that in this case, as in so many others where a fine or penalty is prescribed, with no specific mode for its enforcement, it intended to leave the enforcement and collection of the fine or penalty to the ordinary recognized modes of legal procedure in such cases, as by a prosecution for the offense or an action to recover the penalty. Jurisdiction in general in cases arising under the immigration laws has been conferred upon the circuit and district courts concurrently'' (25 Op. Atty. Gen. 336 at 338).

The same principle was recognized by this Court in *Oceanic Steamship Co.* v. *Stranahan,* 214 U. S. 320, at page 329, where it was said:

> "Both the secretary and the collector were expressly authorized by law, the one to impose and the other to collect the exactions which were made."

That language, however, was used with respect to Section 9 of the Immigration Act of 1903, which by its express terms conferred jurisdiction upon the Secretary of Commerce and Labor to determine liability for fines under that section. The present section does not specify how or by whom the liability for a fine shall be determined.

The immigration law itself observes this principle. For instance, the penalties provided in Section 16 of the Act of 1924 (8 U. S. C. 216), Section 9 of the 1917 Act as amended by Section 26 of the 1924 Act (8 U. S. C. 145), and Sections 35 and 36 of the 1917 Act (8 U. S. C. 169, 171) grant express authority to the Secretary to determine the liability for fines. Many of the other violations of the Act, however, are left for judicial determination in the first instance. Cf. 8 U. S. C. 138, 139, 143, 144, 146, 163, 165, 220.

The provisions of subdivision b of Section 20, dealing with the degree of evidence required to establish a violation, is a strong indication that Congress had in mind that the liability was to be established by judicial rather than administrative procedure. That such was the case in fact is confirmed by the statement in the Senate by Senator Reed, Chairman of the Senate Conference Committee, which reported this section for passage (Cong. Rec., 68th Congress, First Session, p. 8825):

> "Mr. Reed of Pennsylvania: I fully agree with Mr. Furuseth's idea that the men ought not to be detained on the ship, but I reassert that he is overanxious and that there is nothing in the provisions to which he calls attention that could possibly be used to hold the men on ship in such a fashion. The last section that was put in was inserted at the request of the district attorney of New York, who has found it impossible to convict the masters of ships that come in with double crews and go out with the scant requirements of the law. They are smugglers of immigrants. We have to be able to convict them for that smuggling. Unless we can have a presumption that they intended to smuggle from the fact that their outgoing manifest did not include the men who were on the incoming manifest we are never going to get any convictions. No master could hold his men on ship by virtue of that section. If he tried it they could be gotten out on *habeas corpus* in a minute. Unless the Secretary of Labor should undertake to make such a preposterous regulation as that no alien seaman should leave his ship—of course he never would attempt to make such a regulation—they have a vested right to come on shore under this bill."

The determination of liability for fines of this nature had always been by judicial proceedings, and, as indicated

by the statement of Senator Reed, the amendment embodied in Section 20 was on the request of the District Attorney in New York, who had found it difficult to convict under the previous Act because of the high degree of proof required. *The Kathlambra,* 18 Fed. (2d) 113.

Such cases as *United States* v. *J. H. Winchester & Co.,* 40 Fed. (2d) 472, have recognized the right of district courts to take jurisdiction *de novo* of cases arising under this section, where the Government finds it necessary to proceed for their collection under bonds given as security to obtain clearance. And in the case of *Sinclair Navigation Co.* v. *United States* (C. C. A. 5), 32 Fed. (2d) 90, the Court manifestly was of the opinion that the right to refuse clearance was intended merely to provide a means of obtaining security for the fine, if, and when liability should be established and that determination of liability was for the courts. It was there said, page 91:

> "The fine provided by the said section is a civil penalty, and, unless voluntarily paid, could be collected only by a civil suit. In that event the owner of the vessel would have his day in Court, and an opportunity to defend against the imposition of the fine."

Finally the statute must be held to be unconstitutional if the construction applied by the lower courts in the cases at bar should be adopted.

Lipke v. *Lederer,* 259 U. S. 557. In that case this Court, in construing section 35 of the National Prohibition Act, c. 85, 41 Stat. 305, very similar in its penalty provision to the one now under consideration, and involving penalties of similar amount, found it necessary, in order to uphold its constitutionality, to construe the provision as contem-

plating the determination of liability by judicial proceedings. In that connection it was said, page 562:

> "A revenue officer without notice has undertaken to assess a penalty for an alleged criminal act and threatens to enforce payment by seizure and sale of property without opportunity for a hearing of any kind.
>
> "Section 35 prescribes no definite mode for enforcing the imposition which it directs, and, if it be interpreted as above stated, we do not understand counsel for the United States claim that relief should be denied to the appellant. Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be given fair opportunity for hearing—this is essential to due process of law. *Central of Georgia Ry. Co.* v. *Wright*, 207 U. S. 127, 136, 138, 142. And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded. See *Fontenot* v. *Accardo*, 278 Fed. 871."

The practice disclosed by this record falls as much within the condemnation of the foregoing remarks as did the practice against which they were directed.

In these cases orders to detain were issued by an Inspector, which, so far as can be ascertained from the record, may have been at the whim or caprice of the Inspector. If the statute be taken literally, the orders, if valid, imposed an absolute duty on the masters to detain the men on board, which, despite their utmost diligence, they were unable to do. The men having escaped, the evidence and affirmative

defense submitted by the carriers was ignored and a fine was imposed solely because the Inspector had issued a notice to detain and the men had escaped, without requiring evidence of any justification for the issuance of the order.

Under such practice liability for a penalty of $1000 for each seaman is in effect incurred the moment that the Immigration Inspector hands to the master, or any person on board, a notice to detain any of his seamen, unless the master should be fortunate enough to detain the men until departure. And this is so, regardless of whether any valid reason existed for issuing the order. A carrier does not have an opportunity for a hearing in any true sense anywhere along the line.

The dangerous extent to which the lower courts have gone in approving such administrative practices is shown by the fact that fines have been upheld, although imposed by an assistant to the Secretary of Labor, as in these cases, or by the Commissioner General of Immigration or an Assistant to the Secretary of Labor, as in the cases of *United States* v. *Indemnity Co. of N. A.*, 4 F. (Supp.) 636 (D. C., Ala.), and *Lloyd Royal Belge* v. *Elting*, 61 F. (2d) 745 (C. C. A. 2nd). None of these officials are given the power to impose fines by any of the provisions of the Immigration Acts.

This case, then, presents a situation which, we believe, requires the condemnation of Section 20 of the 1924 Act as unconstitutional unless it is subject to the construction herein advocated.

Remarks of this Court in *Boyd* v. *United States*, 116 U. S. 616, at 635, are pertinent:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right as if it consisted more in sound than in substance."

SECOND POINT:

THE ORDERS TO DETAIN WERE INVALID.

a. *Bona fide seamen cannot validly be deprived of ordinary shore leave.*

In these cases there is nothing to show why the Inspector was not satisfied that the men ordered detained were bona fide seamen, and it is neither easy nor reasonable to believe that a well known passenger ship like the *"Ile de France"* would have in her service 102 men who were not bona fide seamen.

Section 3 of the Immigration Act, 1924, 8 U. S. C. 203, must be read in connection with Section 20, because it defines non-immigrants, which classification includes bona fide alien seamen seeking to enter the United States temporarily solely in pursuit of their calling.

By virtue of that section, as well as by virtue of the Seamen's Act, 38 Stat. L. 1164, it cannot be doubted that bona fide alien seamen, of whatever race or nationality, are entitled to shore leave while in ports of the United States. This was recognized by this Court in *Taylor* v. *United*

States, 207 U. S. 120, and by the Second Circuit in *The Limon,* 22 F. (2) 270. It is also recognized in Section 15 of the Immigration Act of 1924 (8 U. S. C. 215).

There being no basis for the orders to detain, they were nullities, and no proceedings for the imposition of fines could be founded upon them.

b. *The status of all aliens, whether immigrants or non-immigrants, must be determined by a Board of Special Inquiry and an order to detain without such determination is invalid.*

Section 20 of the 1924 Act is highly penal in character. It appears to contemplate absolute liability on the part of the carrier for the payment of a fine of $1,000 on account of each alien who may escape after a valid order to detain has been issued. No citation of authorities is necessary to the proposition that such a statute is to be strictly construed and that no penalty will be incurred except for a clear violation of its terms.

The order to detain is required by the Act to be made by "the immigration officer in charge at the port of arrival." That, of course, refers to the Commissioner of Immigration, not to a mere boarding inspector. The orders to detain in these cases were issued by boarding inspectors. It has been argued that since the words "by direction of immigration officer in charge" precedes the name of the Immigration Inspector that the order was really the act of the Commissioner himself, but the facts do not justify the argument.

The Inspector in charge in reporting the case to the Commissioner of Immigration said in part:

"Inspector Lapointe, who examined the crew of *S. S. Ile de France,* upon arrival yesterday, *directed* the detention on board of 102 members of the crew * * *" (No. 6, f. 31). See f. 15 in No. 7. (Italics ours.)

It is plain, therefore, that the Commissioner of Immigration assumed no responsibility in this matter, but delegated his duties to a boarding inspector. Such duties cannot be validly delegated.

New Jersey Wholesale Drug Co. v. *Brown,* 289 Fed. 108;

Bay State Wholesale Drug Co. v. *Potter,* 277 Fed. 529.

When the provisions of the Immigration laws are taken as a whole, the purpose of Congress in requiring the detention order to be issued by the Commissioner rather than a mere Inspector is made plain.

The Commissioner in ascertaining the status of aliens arriving at ports of the United States acts through the instrumentality of a Board of Special Inquiry, which was established by law for that purpose (8 U. S. C. 153).

The law is specific that all *aliens* arriving in the United States by vessel are to receive a primary inspection on board, and that unless they are clearly entitled to land they must be brought before a Board of Special Inquiry. It makes no exceptions. These provisions are found in Sections 15 and 16 of the 1917 Act (8 U. S. C. 151, 152), the pertinent provisions being as follows (italics ours):

"Sec. 15. That upon the arrival at a port of the United States of any vessel bringing *aliens* it shall be the duty of the proper immigration officials to go

or to send competent assistants to the vessel and there *inspect all such aliens* • • •.

"Sec. 16. • • • *Every alien* who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for *examination in relation thereto by a board of special inquiry.*"

The term "alien" is thus defined by the Act:

"The term 'alien' includes any individual not a native born or naturalized citizen of the United States • • •" (8 U. S. C. 224 b).

And it was said in *The Limon*, 22 F. (2) 270 (C. C. A. 2nd), "Congress made no distinction between aliens and alien seamen."

Section 3 of the 1924 Act (8 U. S. C. 203) divided all aliens arriving at a port of the United States into two classifications, immigrants and non-immigrants. Immigrants were subdivided into two further classifications, quota and non-quota (8 U. S. C. 204-205).

All immigrants, whether quota or non-quota, are required to hold immigration visas (8 U. S. C. 213). No such provision is made with respect to non-immigrants. Their status is determined by other documents, depending upon the character of the non-immigrant.

Non-immigrants include: (1) Government officials, (2) tourists, (3) aliens in transit, (4) bona fide seamen, and (5) aliens coming to the United States under express treaty provisions.

It has been argued that the provisions of Sections 15 and 16 requiring aliens of doubtful status to be brought before the Board of Special Inquiry apply only to immi-

grants and have no application to non-immigrants. That argument is of no avail because the basis of a detention order necessarily is that the alien is not a bona fide seaman. If he is not a bona fide seaman, he is an immigrant, as was pointed out by this Court in *Karnuth* v. *United States*, 279 U. S. 231, in which it was said (242, 243):

> "This term [immigrant] thus includes every alien coming to this country either to reside permanently or for temporary purposes, unless he can bring himself within one of the exceptions."

The law itself does not make the suggested distinction, and the fallacy of the argument is evident when it is considered that if those provisions are not applicable to non-immigrants then there is no provision, whatever, in the law to safeguard against the illegal entry of non-immigrants. As a matter of fact every other class of non-immigrants, whose status is questioned, is brought before a Board of Special Inquiry, as a matter of course.

The decisions of the courts and the practice of the Department alike recognize that the method of determining the status of aliens is the same, whether they are immigrants or non-immigrants. *Domenici* v. *Johnson*, 10 Fed. (2d) 433; *U. S. ex rel Rizzo* v. *Curran*, 13 Fed. (2d) 233; Immigration Rule 6, subdivision A, paragraph 3, and Rule 3, subdivision H, paragraphs 2 and 3 of the Immigration Rules of January 1, 1930. Seamen alone have been denied this privilege and have been left to the whim or caprice of boarding inspectors.

Such a construction is contrary to the clear intention of the Act when due consideration is given to the fact that a detention order is required to be made by the Commissioner of Immigration, who can act in such cases only

through the medium of a board of special inquiry—the statutory fact finding body. It is also contrary to the practice intended by Congress when the provision was adopted. This is shown by the remarks of Senator Reed, chairman of the Conference Committee, in reporting the Conferees' agreement to the Senate (Cong. Rec., 68th Congress, First Session, p. 8826):

> "Mr. Reed of Pennsylvania. The immigration inspector goes on board the vessel and inspects every member of the crew and every member on the passenger list. He finds some that claim to be government officials and others that claim to be seamen employed on the ship, and he has to use his judgment. If he finds a man claiming to be a government official who he thinks is not a government official, he says, 'You go to Ellis Island for examination by the board of inquiry,' and the same thing if he finds a seamen whom he does not think is a bona fide seaman.
>
> "Mr. Shipstead. That takes the seaman into the immigration question if he is taken to Ellis Island.
>
> "Mr. Reed of Pennsylvania. Of course. Every human being that comes to this country from another country has to be examined by an immigration inspector. Everybody, including government officials, has to pass some scrutiny.
>
> "Mr. Shipstead. And the seaman on the ships?
>
> "Mr. Reed of Pennsylvania. Including the seamen on the ships. The crew of the vessel is inspected just like the passengers on the vessel and they have to show the bona fides of their status just the same as an ambassador who comes here. He is outside the immigration laws if he presents evidence that he is a real ambassador, and the same thing is true of an alien seaman. They have to show something to establish their status. That is the exact situation.

"Mr. Shipstead. Then what is to be done with him?

"Mr. Reed of Pennsylvania. *If the inspector says that he is a fraud, that he is not what he pretends to be, he sends him to Ellis Island or similar detention station, where he is examined before the board of inquiry consisting of three judges.* If he thinks the man is not a fraud he passes him and he comes right in. It has been worked that way for many years." (Italics ours.)

Thus Congress showed its solicitude for the right of seamen to enjoy shore leave while in our ports. It showed the same solicitude in Section 15 of the 1924 Act (8 U. S. C. 215), where it was provided that bonds might be exacted of all non-immigrants, *except seamen,* to insure the maintenance of their status and their departure from the United States.

Furthermore, Section 20 of the Act (8 U. S. C. 167), especially when application is given to subdivision C of that section, clearly contemplates that the deportation of the seamen shall be at the direction of the Secretary of Labor. There is no means by which the Secretary can be placed in the position of exercising the discretionary power granted by subdivision C if the seaman is not brought before a Board of Special Inquiry and a record made for his consideration.

It has been suggested that it would be a physical impossibility for the Commissioner of Immigration at this port, himself, to make a personal inspection and to sign detention orders in the case of every vessel arriving at his port. But the Commissioner, himself, does not go aboard vessels for the examination of aliens of any classification. The aliens are sifted by primary inspection. Only the doubtful cases are sent to the immigration station and they are there

examined not by the Commissioner but by a Board of Special Inquiry. It is the business of the Board of Special Inquiry to examine all aliens of doubtful status, and there is no reason why it should be more burdensome to examine seamen than to examine the cases of the many incoming aliens of other classifications, both immigrants and non-immigrants. In any case, mere expediency should not form the basis of a judicial determination of personal or property rights, nor operate to their prejudice.

c. *The fines were not imposed by the Secretary of Labor.*

Even though it should be held that determination of liability for such fines may be made by the Secretary of Labor, these fines cannot be upheld, because they were not imposed by him. They purport only to have been imposed by W. N. Smelser, an "Assistant to the Secretary," on the recommendation of L. Paul Winings, Chairman, Secy. and Comr. Genl.'s Board of Review (No. 6, f. 41; No. 7, f. 27).

The Board of Review is not a statutory body, but is a voluntary board created within the Department itself, consisting of three or more employees of the Department. Mr. Smelser, who ordered the imposition of the fine, was neither the Secretary of Labor nor an Assistant Secretary of Labor. He claimed to be and was only an "Assistant to the Secretary." It thus appears that judicial functions of serious importance were left to Departmental Clerks instead of being performed by the officer who, according to the contention of the defendant, had been given the power to exercise those functions.

Such duties cannot legally be delegated to subordinates, and any action of a subordinate pursuant to such delega-

tion is a nullity. *Runkle* v. *United States,* 122 U. S. 543; *New Jersey Wholesale Drug Co.* v. *Brown,* 289 Fed. 108; *Bay State Wholesale Drug Co.* v. *Potter,* 277 Fed. 529.

It is not contended that routine administrative functions of such an official as the Secretary of Labor cannot be delegated to others in the Department. Judicial duties, however, stand on an entirely different plane. They require the personal consideration of the designated officer. While he may call others to his assistance in the way of assembling facts and otherwise advising, the determination of the question for decision must be his personal act.

In this case there is nothing to indicate that the Secretary of Labor had anything whatever to do with the imposition of the fine.

On this point this Court, in *Runkle* v. *United States, supra,* made the following observations, page 557:

> "Here, however, the action required of the President is judicial in its character, not administrative. As Commander-in-Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such power he cannot delegate."

If the points herein discussed are well taken, we believe the judgments below should be reversed on these grounds, in addition to the more technical ones presented by the Petitioners, because of the importance of having an authoritative interpretation of the true meaning of this ambiguous statute, as well as to set the administrative officials right as to the conditions precedent to be observed in the

collection of these drastic penalties through summary and extra-judicial acts such as are disclosed in the cases at bar.

Respectfully submitted,

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Dated, September 20, 1935.

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SUPREME COURT OF THE UNITED STATES.

Nos. 6 and 7.—October Term, 1935.

Compagnie Generale Transatlantique, Petitioner, vs. Philip Elting, Collector of Customs, Port of New York.	Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
Hamburg-American Line, Petitioner, vs. Philip Elting, Collector of Customs, Port of New York.	

[May 18, 1936.]

Mr. Justice Van Devanter delivered the opinion of the Court.

These cases are much alike. Each involves the validity of a fine imposed on the owner of a foreign ship for an asserted failure to detain on board certain alien seamen after their examination. In both the owner seeks to recover money deposited with the collector of customs to cover the fine, if and when imposed. The deposit was made to obtain clearance of the vessel pending the administrative proceedings which resulted in the fine. A trial by jury resulted in a directed verdict and judgment for the collector, which the Circuit Court of Appeals affirmed. 74 F. (2d) 209. The cases are here on certiorari, which was granted because of an apparent divergence in Court of Appeals decisions.

The material facts, taken largely from controlling allegations and admissions in the pleadings and in part from undisputed evidence, are as follows:

In No. 6 the *Ile de France*, owned by a foreign corporation, arrived at the port of New York from a foreign port February 6, 1930, with two aliens in her crew. Under the supervision of the immigation officer in charge, an inspector boarded the ship, examined the crew, and directed the master to detain the two aliens on the ground that they were not shown to be bona fide seamen. The master endeavored to detain them, but they escaped during the night following the direction given to the master. The direction

was in writing and addressed "To the Owner, Agent, Consignee, Master or Officer in Charge of the *Ile de France*", but was neither served on the owner nor brought to its knowledge prior to the escape. The master reported the escape and the immigration officer then served on the New York agent of the ship a notice to the effect that a fine was about to be imposed for the failure to detain; that a hearing would be allowed if desired; and that the ship would be granted clearance for her outward-bound voyage upon condition that there be deposited with the collector of customs the sum of $2,000 to cover the fine, should one be imposed. The owner made the deposit under protest, and through counsel requested and participated in a hearing; after which the administrative officers imposed on the owner a fine of $1,000 in respect of each of the alien seamen not detained.

In No. 7 the owner was another foreign corporation. The direction to detain related to but one alien seaman, was delivered to the chief officer of the ship, and was then brought to the knowledge of the master but not to the knowledge of the owner. The master took steps to detain, but the alien seaman escaped. The amount of the deposit, as also the fine, was $1,000. In all other material respects the facts are like those in No. 6.

The statute under which the fines were imposed is § 20 (a) of the Immigration Act of 1924, c. 190, 43 Stat. 164, 8 U. S. C. 167 (a), which provides:

"The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Secretary of Labor so to do, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs."

The purpose of the section is to prevent aliens from unlawfully gaining entrance into the United States under the guise of seamen, and to this end it makes provision for detention on board, both temporary and continued, and for imposing fines on those who, when under a duty to detain, fail to do so. It relates to all vessels arriving within from without the United States with alien seamen employed thereon. Such vessels may be either domestic or foreign, may be owned by individuals or corporations, may be engaged in transportation for hire or otherwise, and may be, as the section plainly contemplates, in the immediate control of the owner or of a charterer, agent, consignee or master.

The fine is laid, not on the owner generally, but on the "owner, charterer, agent, consignee or master of any vessel . . . who fails to detain" until an examination is made, or "who fails to detain" after examination "if required" by the immigration officer "so to do".

Our present concern is with a fine for failing to detain after examination. A duty so to detain does not arise unless and until such detention is required by the immigration officer. Obviously the requirement must be communicated to the one on whom the duty is to rest; otherwise he could not be regarded as "required" so to detain or as "failing" to do so. This is conceded in the brief for the collector, where it is said: "The statute employs the word 'required' in respect of the continued detention. Of course, this means that in some manner the order of detention must be brought home to the party sought to be charged".

Here the requirement was communicated to the master of the ship but was not in any way brought to the knowledge of the owner; and yet the administrative officers imposed the fine on the latter. The court below sustained this administrative action on the theory that the master of a ship represents the owner, and therefore notice given to the master may and should be imputed to the owner. But in our opinion the section does not admit of the application of that theory. It contains nothing indicative of a purpose to regard notice to one of the enumerated persons as binding the others or any of them. On the contrary, it deals with all in the same way, includes each of them in the enumeration by reason of his relation to the vessel and his authority over her, and puts each on a plane of individual duty and liability regardless of any relation of one to another.

We conclude therefore that so much of the section as is pertinent here is intended to have effect as follows: A master in charge who is required by the immigration officer to detain alien seamen after examination becomes thereby personally charged with a duty to detain them, and, if he fails therein, becomes personally subject to the prescribed fine. The same thing is true of the owner, charterer, agent or consignee. But none is charged with a duty so to detain unless he is notified of that requirement, and notice to one does not without more operate as notice to another.

Earlier decisions in the Court of Appeals, while dealing with facts somewhat different from those now presented, gave to the section a construction similar to that which we give to it. In *United States* v. *J. H. Winchester & Co.*, 40 F. (2d) 472, there was an effort to subject the agent of a foreign ship to a fine for a failure to detain after inspection. Notice to detain had been served on the master but not brought to the knowledge of the agent. Counsel for the Government urged that, as the ship was foreign, notice to the master bound all, including the agent. But the court held that the section makes no distinction between foreign and domestic vessels; that to be effective the notice to detain must be brought home to the party sought to be charged; and that notice to the master does not suffice to charge the agent. *United States* v. *Columbus Marine Corporation*, 62 F. (2d) 795, involved another effort to collect a fine from a ship's agent. A detention order addressed to all who are enumerated in the statute had been served on the master but not on the agent. The court followed the decision in the *Winchester* case, ruled that as the order was served only on the master it did not impose any duty on the agent, and therefore that he was not liable for the failure to detain. *Lancashire Shipping Co.* v. *Elting*, 70 F. (2d) 699,[1] presented still another effort to fine a ship's agent where the order to detain had been communicated to the master only. The court held that the agent, being without notice of the order, was not required to detain; and in rejecting a contention that the notice to the master bound the agent the court said:

"The master was not the representative of the agent and in accepting service of the detention order, he may not be assumed to have acted for it [the agent]. The master is a party under the statute made liable for his violation. He must be regarded as acting in his individual capacity in taking the order."

[1] Certiorari denied, 293 U. S. 594.

While the admiralty law regards the master of a ship as the agent of the owner,[2] the section before us takes no account of that relation but deals with the master just as it does with the owner. If either is notified to detain he must comply or be subject to a fine. Nothing in the section indicates that notice to the master and a failure by him are to be imputed to the owner and made a basis for fining the latter.

We conclude that the direction of verdicts for the collector was error and that the judgments should be reversed and the cases remanded to the District Court for a new trial.

Judgments reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[2] The agency is not general but special, as is explained in General Interest Insurance Co. *v.* Ruggles, 12 Wheat. 408, 411-412.